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No. 10-885

IN THE
Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Feres v. United States*, 340 U.S. 135 (1950), this Court created a non-textual exception to the broad waiver of immunity enacted by Congress in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 *et seq.* The *Feres* doctrine, as that exception is called, bars active-duty military personnel from bringing claims against the government for injuries arising out of activity incident to service. Despite this Court's reaffirmance of the doctrine in *Johnson v. United States*, 481 U.S. 681 (1987), it remains unworkable. It has generated inconsistent and inequitable outcomes for more than 60 years, and lower courts regularly call for this Court to reconsider it.

The Question Presented is:

Should the *Feres* doctrine be overruled, in whole or in part, on the ground that the FTCA should not be construed to include a non-textual exception barring claims for injuries arising out of activity incident to service or, if there is such an exception, it does not bar a claim for injury to a service member caused by medical malpractice at a military hospital when the service member was on leave when admitted to the hospital?

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Alexis Witt, on behalf of the Estate of Dean Witt, deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

In *Feres v. United States*, 340 U.S. 135 (1950), this Court announced a judicial gloss on the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), to bar tort claims against the government by active-duty military personnel injured incident to service. In *Johnson v. United States*, 481 U.S. 681 (1987), the Court reaffirmed the *Feres* doctrine in a 5-4 decision. Both before and after *Johnson*, the vague, ill-defined contours of the *Feres* doctrine have vexed lower courts seeking to apply this Court's precedent and generated an unprecedented outpouring of expressions of dissatisfaction from federal judges. This case presents the Court with an opportunity to revisit the *Feres* doctrine and to fashion a workable and more stable precedent faithful to Congress's intent.

In 1946, Congress enacted the FTCA as a broad waiver of sovereign immunity from tort liability for the negligent or wrongful acts of federal government employees. Although the FTCA contains a list of specific exceptions to this expansive waiver of immunity, *see* 28 U.S.C. § 2680, none expressly precludes all claims by members of the military. In fact, the only statutory exception that mentions military personnel creates a limited exception for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j). Nonetheless, in *Feres*, this Court held that service members cannot bring claims against the government for injuries that "arise out of

or are in the course of activity incident to service." 340 U.S. at 146.

For the next 37 years, lower courts struggled to apply the *Feres* ruling without performing manifest injustice, often unsuccessfully. In 1987, by a 5-4 vote, this Court in *Johnson* reaffirmed the *Feres* doctrine without a single reference to the text of the FTCA and over a vigorous dissent by Justice Scalia. Now, nearly 25 years after *Johnson*, lower courts continue to struggle to apply the ill-defined doctrine while decrying its harsh results and calling for this Court to overrule *Feres*. This case presents the Court with an opportunity to reconsider *Feres* and *Johnson* and to end the inequities and confusion spawned by the Court's 60-year-old mistake.

OPINIONS BELOW

The court of appeals' opinion (App. 1a–2a) is reported at 379 F. App'x 559. The district court's order (App. 3a–7a) is not reported.

JURISDICTION

The court of appeals entered its judgment on May 14, 2010. A petition for rehearing was denied on August 11, 2010. App. 10a. On November 4, 2010, Justice Kennedy extended the time to file a petition for certiorari until January 7, 2011. App. 14a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves a judicially created exception grafted onto the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 *et seq.* The pertinent provisions of the FTCA are reproduced at App. 11a–13a.

STATEMENT

United States Air Force Staff Sergeant ("SSgt.") Dean Patrick Witt died as a result of egregious medical malpractice in a U.S. military hospital. SSgt. Witt's widow, petitioner Alexis Witt, brought this suit against the government on behalf of his estate.

In October 2003, SSgt. Witt was a healthy 25 year old on a protracted leave pursuant to a Permanent Change of Station Order. He was in the process of moving his family – his wife Alexis, daughter Hannah, and newborn son Noah – from Hill Air Force Base in Utah to Travis Air Force Base in California. While his family remained in Utah, SSgt. Witt transported his family's belongings to their new home.

Shortly after arriving in California, SSgt. Witt experienced severe abdominal pain. He sought treatment at David Grant Medical Center, the base hospital at Travis Air Force Base, where he was diagnosed with acute appendicitis. Twenty days before he was scheduled to report to his new commanding officer, SSgt. Witt underwent a routine appendectomy without incident or complications.

SSgt. Witt's post-operative care, however, was grossly negligent. While being moved from the operating room to the post-anesthesia care unit, SSgt. Witt exhibited signs of breathing distress and began turning blue. In response, the supervising nurse anesthetist attempted to ventilate SSgt. Witt with pediatric equipment, but the attempt was unsuccessful because the equipment was too small. She then attempted a direct endotracheal intubation, but it was later discovered that she had placed the tube in SSgt. Witt's esophagus rather than in his trachea,

thus completely depriving him of oxygen. During these failed attempts at resuscitation, the nurse anesthetist neglected to signal a "Code Blue," an act that would have called a resuscitation team to assist her in this emergency. Eventually, an M.D. anesthesiologist arrived and performed a second endotracheal intubation, which was successful. By then, SSgt. Witt had been deprived of oxygen for several minutes, causing a severe and permanent brain injury. SSgt. Witt lapsed into a coma. Less than three months later, "[a] 25 year old man who [had] devoted his life to serving his country" died "through no fault of his own." App. 6a.

The negligent care provided to SSgt. Witt is well documented. An independent expert reviewed SSgt. Witt's medical records and cited 19 separate breaches of the standard of care during his treatment. Upon investigation by the California Board of Nursing, the supervising nurse anesthetist responsible for SSgt. Witt's post-operative care admitted that she was guilty of gross negligence and/or incompetence and surrendered her license to the Board.

Petitioner's claims on behalf of the estate of SSgt. Witt were filed with and presented administratively to the United States Air Force on August 25, 2005, pursuant to 28 U.S.C. §§ 2672 and 2675(a). On March 7, 2008, the Air Force denied the claim. *See* App. 8a–9a. Petitioner filed this suit on August 28, 2008, in the United States District Court for the Eastern District of California. The government moved to dismiss for lack of subject matter jurisdiction, claiming that the suit is barred under *Feres* and its progeny.

The district court, granting the government's motion to dismiss, noted that "[t]he alleged facts in

the instant case are so egregious and the liability of the Defendant seems so clear that this Court did give serious consideration to Plaintiff's argument that this Court should allow this claim in spite of *Feres*." App. 6a. Ultimately, the court concluded that, "as wrong-headed as it may seem, this Court is duty-bound to follow precedent" and apply the *Feres* doctrine to bar the claim. App. 7a. But the court went on to "encourage[] the Ninth Circuit to consider the *Feres* Doctrine en banc, especially in light of the inequitable result of its application in this case," and "further join[] in Judge Ferguson's plea to the Supreme Court . . . that now is the time to revisit the *Feres* doctrine." *Id.* "Reluctantly" reaching a conclusion that "can only be characterized as unfair and irrational," the court entered final judgment on February 10, 2009. App. 3a, 7a.

On appeal to the Ninth Circuit, petitioner argued that the plain language of the FTCA does not bar medical negligence claims by active-duty service members, particularly when on leave from military duty. Despite the district court's strong urging to reconsider the application of the *Feres* doctrine in the present case, the Ninth Circuit affirmed. *See* App. 1a–2a. The court of appeals stated that, "[a]lthough we acknowledge the tragic circumstances underlying this lawsuit, we are bound by precedent of the Supreme Court and our court to affirm the district court's dismissal." App. 2a.

REASONS FOR GRANTING THE PETITION

Feres and *Johnson* have proven to be unstable and harsh precedents, engendering disrespect among lower courts, unfairness to military service personnel, and countless exhortations to this Court to reconsider the soundness of the doctrine. This case provides an ideal opportunity for this Court to overrule *Feres* and *Johnson* and to restore Congress's intent in the FTCA, as expressed in the statute's plain language and purposes.

I. LOWER COURTS HAVE BEEN UNABLE TO APPLY THE ILL-DEFINED *FERES* DOCTRINE FAIRLY AND CONSISTENTLY, AND HAVE URGED THIS COURT TO RECONSIDER IT IN UNPRECEDENTED NUMBERS

Pursuant to *Feres* and *Johnson*, "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Johnson*, 481 U.S. at 692. That formulation is vexingly vague, and lower courts have struggled for more than 60 years to apply it fairly and consistently. Notwithstanding this Court's efforts to provide needed clarification in *Johnson*, the confusion and inequity created by the *Feres* doctrine have gotten worse, not better, in the 25 years since *Johnson* was decided. Because *stare decisis* "is a principle of policy and not a mechanical formula of adherence," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), adherence to precedent must yield to reasoned reconsideration when "the analytical underpinnings [of a holding are] substantially weakened," *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997), and when "a precedent [is] a positive detriment to coherence and consistency in the law . . . because of in-

herent confusion created by an unworkable decision," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *see also Board of County Comm'rs v. Brown*, 520 U.S. 397, 431 (1997) (Breyer, J., dissenting) ("[L]ater law had made the original distinction, not simply wrong, but obsolete and a potential source of confusion.") (collecting cases that have reexamined prior statutory interpretations). Because of the problems created by continued adherence to *Feres* and *Johnson*, this Court should grant certiorari to revisit those precedents.

A. Courts Of Appeals Have Created Inconsistent Tests For Applying *Feres*

Because the *Feres* bar is a judicially created exception to the FTCA expressed in imprecise terms and based on evolving and unpersuasive policy considerations, lower courts are left with little guidance in applying it. The *Johnson* Court's attempt to solidify the doctrine failed to provide meaningful direction, and interpretive difficulties continue to plague the lower courts. *See Taber v. Maine*, 67 F.3d 1029, 1043 (2d Cir. 1995) ("[I]t is not surprising that *Johnson* – a decision that we are bound to follow – left both the doctrine and the lower courts more at loose ends than ever.").

The Ninth Circuit, for example, has abandoned attempts to apply the *Feres* doctrine by reference to its original justifications, noting that it is "unclear which of the doctrine's original justifications survive." *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991). Instead, the Ninth Circuit has developed a four-factor test to determine whether *Feres* bars a particular suit. *See Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007). The relevant factors are: "(1) the place where the negligent act occurred;

(2) the plaintiff's duty status when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a service member; and (4) the nature of the plaintiff's activities at the time the negligent act occurred." *Id.*; *see also McConnell v. United States*, 478 F.3d 1092, 1095 (9th Cir. 2007). Under this test, "none of these factors are dispositive," *McConnell*, 478 F.3d at 1095, and the court focuses on the "totality of the circumstances," *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2002). In reality, however, judges in the Ninth Circuit apply the *Feres* doctrine by engaging in ad hoc factual analogies with prior precedents. *See, e.g.*, *Schoenfeld*, 492 F.3d at 1019 ("Despite this framework, our *Feres* jurisprudence is something of a muddle. . . . Therefore, we now examine 'the Ninth Circuit cases that are most factually analogous to the case at bar to determine whether the *Feres* doctrine bars [plaintiff's] suit.'") (quoting *Dreier v. United States*, 106 F.3d 844, 849 (9th Cir. 1996)); *see also McConnell*, 478 F.3d at 1095 n.3 ("'[W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable, and thus, comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases.'") (quoting *Costo*, 248 F.3d at 867).

Other courts of appeals take the opposite approach, assessing the facts in each case in light of the three policy factors identified by the *Johnson* majority as justifications for the Court's reaffirmance of its *Feres* construct. For example, the Fourth Circuit evaluated the nonfederal nature of the parties' relationship, the unavailability of alternative government benefits, and the fact that resolution of the medical malprac-

tice suit was unlikely to unduly interfere with military discipline or require the court to second-guess military decision-making before permitting an active-duty service member to sue the government for injuries suffered by her infant son due to negligent prenatal care. *See Romero v. United States*, 954 F.2d 223, 226 (4th Cir. 1992). The Sixth Circuit engaged in a similar analysis to conclude that *Feres* does not bar a medical malpractice claim by an active-duty service member for the injury caused to her gestating child by her doctor's failure to prescribe prenatal vitamins. *See Brown v. United States*, 462 F.3d 609, 613 (6th Cir. 2006) ("[N]one of the three considerations typically invoked to support application of the *Feres* doctrine seems to apply with particular force in the case of a servicewoman seeking prenatal care in anticipation of or during pregnancy.").

Still other courts of appeals, such as the Seventh and Tenth Circuits, ignore the rationales underlying the *Feres* doctrine and attempt to resolve service members' claims by holistically assessing whether the service member's injury occurred "incident to service." *See, e.g., Maas v. United States*, 94 F.3d 291, 295 (7th Cir. 1996) ("Application of the *Feres* doctrine does not depend on the extent to which its rationales are present in a particular case. Rather the test is whether the injuries are based on 'service-related activities.'") (citation omitted); *see also Purcell v. United States*, 137 F. App'x 158, 159–60 (10th Cir. 2005) ("Recent decisions have made it clear that the overarching question under *Feres* is whether the plaintiff's injury was 'incident to service,' regardless of the presence of any 'special factors' potentially implicating or undermining the legal rationales historically advanced for the doctrine."); *Tootle v. USDB*

Commandant, 390 F.3d 1280, 1282 (10th Cir. 2004) ("Rather than focusing on the presence or absence of the *Feres* rationales . . . the relevant question is whether [plaintiff's] alleged injuries arose 'incident to service.'").

In some circuits, the "incident to service" inquiry has given rise to its own set of multi-factored tests, essentially divorced from the rationales underlying the *Feres* bar. The First Circuit, for example, determines whether an injury is incident to service by "asking whether it occurred on a military facility, whether it arose out of military activities or at least military life, whether the alleged perpetrators were superiors or at least acting in cooperation with the military, and . . . whether the injured party was himself in some fashion on military service at the time of the incident." *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682 (1st Cir. 1999) (citations omitted). The Fifth and Eleventh Circuits have adopted similar, but not identical, tests for determining whether an injury is incident to service. *See Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001) ("We apply a three-part test to determine whether an injury is incident to service. When undertaking such an analysis, we consider, (1) the duty status of the service member, (2) the place where the injury occurred, and (3) the activity the serviceman was engaged in at the time of injury.") (internal quotation marks omitted); *Schoemer v. United States*, 59 F.3d 26, 28 (5th Cir. 1995) ("*Feres* applies if the serviceman's injury was incident to military service. We examine the totality of the circumstances to determine whether a serviceman's injury was incident to military service. In particular, we consider: (1) the serviceman's duty

status; (2) the site of his injury; and (3) the activity he was performing.") (citations omitted).

B. The Inconsistent Tests Developed By The Courts of Appeals For Applying *Feres* Generate Irreconcilable And Inequitable Results

Not surprisingly, the various tests that the lower courts have adopted in their attempts to apply the imprecise *Feres* bar have generated a plethora of irreconcilable outcomes. These inconsistencies highlight the failure to achieve one of the *Johnson* Court's stated justifications for affirming the *Feres* doctrine – the need for uniformity. *See* 481 U.S. at 689. Moreover, the divergence in outcomes among essentially indistinguishable cases undermines the integrity of the entire doctrine.

1. The infinitely malleable "incident to service" standard has led lower courts into an unnavigable morass in attempting to apply *Feres* to new circumstances. For example, courts struggle to determine whether infant children of military personnel injured by negligent prenatal care are barred by *Feres* from suing the government for their injuries, and the cases generate divergent results, even within the same circuit. The Sixth Circuit has held that *Feres* both *does* and *does not* bar suit by civilian children for injuries they suffered as a result of negligent prenatal care given to their active-duty service-member mothers. In *Irvin v. United States*, 845 F.2d 126 (6th Cir. 1988), the court held that *Feres* barred a claim based on negligent prenatal care to a member of the military that resulted in the premature birth and consequent death of her daughter. In *Brown v. United States*, 462 F.3d 609 (6th Cir. 2006), the court permitted a father to sue the government for injuries

sustained by his infant daughter as a result of negligent prenatal care of her service-member mother. Although the *Brown* panel attempted to distinguish the cases based on the type of negligent prenatal care at issue, *id.* at 615, the outcome of the cases defies reason.

The Fourth Circuit also permitted active-duty military parents to sue the government for negligent prenatal care that resulted in their son's premature birth and cerebral palsy. Although noting that the appropriate prenatal care would have involved medical treatment applied directly to his mother's body, the court nonetheless held that *Feres* did not bar suit because "the purpose of the treatment was to insure the health of a civilian, not a service member." *Romero*, 954 F.2d at 225. The *Romero* court's conclusion that the injured dependent's claim was not *Feres*-barred meant that his parents, both active-duty service members, could sue the government for the consequential damages they suffered as a result of their child's injury. *See id.* ("The government conceded at oral argument that if [the child's] claim is not *Feres*-barred, the claim of his parents . . . likewise is not barred. We agree. It is obvious that active duty service persons may recover consequential damages for non-physical injury they sustain as a result of injury to a civilian dependent."). Thus, although the mother in *Romero* would not be able to sue the government if she were injured by negligent prenatal care, she would be permitted to sue *for her own injuries* if they were consequential to injuries suffered by her unborn child as a result of the very same negligent prenatal care.

In contrast to the Fourth Circuit's reasoning in *Romero*, the Fifth Circuit has rejected claims by

children injured by negligent prenatal care because "[t]he treatment accorded [the] mother is inherently inseparable from the treatment accorded [the plaintiff] as a fetus in his mother's body." *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982).

Even within the same *case*, a circuit has reached inconsistent and irrational outcomes applying *Feres*. In *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987), a service-member mother sued the government for negligent prenatal care that led to the premature birth of her twin sons. From that negligent care, the mother and one son suffered serious personal injuries, and the other son died. The service member sought damages for her own personal injuries, as guardian of her infant son for his injuries, and as representative of her deceased son's estate for his death. The court held that the mother's personal injury claim was barred by the straightforward application of *Feres*, that the surviving son's claim could proceed because the maintenance of that claim "will not circumvent the purposes of the FTCA," and that the mother's claim as representative of her deceased son's estate was barred by *Feres* because it sought to hold the government liable for a direct injury to the mother. *Id.* at 287–88.

The courts of appeals resolving these prenatal care cases are fully aware that their decisions contribute to an illogical patchwork of rulings. *See Romero*, 954 F.2d at 226–27 ("We think the facts of *Scales* and *Irvin* are distinguishable from the instant case, but to the extent that their reasoning may not be distinguishable, we simply disagree."); *see also Mossow v. United States*, 987 F.2d 1365, 1370 n.11 (8th Cir. 1993) ("[W]e follow the Fourth Circuit in stating that

to the extent the reasoning in *Irvin* and *Scales* applies to the case before us, we disagree.").

The outcomes in *Del Rio* and *Romero* cannot be reconciled with any coherent view of the policy considerations that might have led this court to reaffirm *Feres* in *Johnson*. And the complete randomness within the *Del Rio* opinion and among the *Feres* prenatal care cases in general cannot be tolerated by a judicial system built upon the rule of law.

2. Confusion generated by the vague *Feres* standard extends far beyond the prenatal care context. Courts also struggle to determine whether a service member injured during purely recreational activities marginally related to military service may sue the government for compensation, again with irreconcilable results. In *Costo*, for example, the Ninth Circuit held that an active-duty service member who was killed during a recreational rafting trip sponsored by the Navy's Morale, Welfare and Recreation ("MWR") program could not pursue a tort claim against the government. Although the plaintiff was off-duty when injured and the off-base rafting trip was led by civilian guides, the Ninth Circuit found the injury "incident to service" because the rafting trip was a benefit available to the plaintiff only by virtue of his military status and during it he was subject to military orders and discipline. *See* 248 F.3d at 867; *see also Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986) (barring suit by an active-duty service member on liberty who was injured while operating a canoe rented from the Navy Special Services facility in San Diego).

In contrast, in *Regan v. Starcraft Marine, LLC*, 524 F.3d 627 (5th Cir. 2008), the Fifth Circuit permitted a tort action by an active-duty service member who

was injured on a pontoon boat rented from a civilian company licensed to operate at the Army's MWR facility in Toledo Bend. The court held that his injury was not "incident to service" – and thus his suit would not be *Feres*-barred – because its connection to the plaintiff's military status was "largely coincidental," even though, as in *Costo*, the benefit was available to the plaintiff only because of his military status and he was subject to military rules and discipline during the recreational outing. *Id.* at 644–45;* *see also Kelly v. Panama Canal Comm'n*, 26 F.3d 597, 599–600 (5th Cir. 1994) (permitting a claim stemming from an accident that occurred in a boat rented from an on-base marina, because the service member was off-duty and off-base when injured).

The Federal Reports are replete with cases demonstrating the challenges lower courts face in applying the imprecise doctrine in a fair and consistent manner. For example, the Third Circuit held that the murder of a female Naval officer, which occurred while she was sitting in her living room watching a movie with a friend, occurred "incident to service" because she lived on base and her assailant (a former fiancé) also was a Naval officer. *See O'Neill v. United States*, 140 F.3d 564, 565 (3d Cir. 1998) (Becker, C.J., statement sur denial of the petition for rehearing) ("[I]t is difficult for me to imagine anything less incident to service than being attacked by an ex-lover while sitting at home watching a movie with a friend. Surely, Smith would have killed O'Neill even if she

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* The issue resolved in that case was the indemnity action by the civilian boat manufacturer against the government. That claim would have been barred under *Stencel Aero Engineering Co. v. United States*, 431 U.S. 666 (1977), if the underlying tort claim were *Feres*-barred.

was a civilian at the time."). And the Tenth Circuit has held that injures suffered during a beating by gang members occurred "incident to service" and the claims were therefore *Feres*-barred, because the gang members had been loitering in the parking lot of an on-base NCO club. *See Pringle v. United States*, 208 F.3d 1220, 1222, 1227 (10th Cir. 2000).

The Ninth Circuit, in contrast, permitted an active-duty Air Force officer to proceed with her tort claim for injuries suffered when other Air Force members broke into her office, stole personal correspondence, and disseminated it in an effort to damage her reputation, because those injuries did not occur "incident to service." *See Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1488 (9th Cir. 1991). Likewise, the Eighth Circuit permitted an African-American National Guardsman to sue the government after he lapsed into a deep depression and shot himself because fellow soldiers subjected him to a "mock lynching" at an on-base party, behavior that the court felt could not serve any conceivable military purpose and was therefore not "incident to service." *Brown v. United States*, 739 F.2d 362, 369 (8th Cir. 1984). The Tenth Circuit similarly refuses to apply a *Feres* bar to suits seeking compensation for conduct that involves a "distinctly nonmilitary act." *E.g.*, *Durant v. Neneman*, 884 F.2d 1350, 1354 (10th Cir. 1989) ("When military personnel are engaged in distinctly nonmilitary acts, they are acting, in effect, as civilians and should be subject to civil authority.").

3. The widely contrasting results reached in the lower courts' efforts to apply the *Feres* doctrine have given rise to absurdities and rank inconsistencies. In two cases reaching opposite conclusions, the distinction between being *Feres*-barred and having access to

recovery appeared to rest on the difference between a long weekend and a normal commute. *Compare Parker v. United States*, 611 F.2d 1007, 1015 (5th Cir. 1980) (holding that *Feres* did not bar suit by a service member's family for his death, which occurred when he was hit by a military vehicle while driving on an army-maintained road within Fort Hood, because he was leaving the base for a four-day weekend and therefore the injury was not incident to service), *with Richards v. United States*, 176 F.3d 652, 656 (3d Cir. 1999) (barring recovery when service member was killed while driving home from work when his private vehicle was broadsided by a five-ton military truck on a public highway that runs through Fort Knox Army Base). In reaching that unjust result in *Richards*, the Third Circuit was fully aware of the illogic and inequity of its ruling. *See id.* at 657–58 ("[W]e are left with a counter-intuitive and inequitable result simply because of Private Richard's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it. Again, we express concern and note that the result we reach does not actually advance the philosophy behind *Feres*.") (citations omitted). *Richards*, in turn, is impossible to reconcile with *Schoenfeld*, in which the Ninth Circuit held that *Feres* did not bar a claim by an active-duty service member injured in a car accident on base because he was on liberty for the weekend and riding in a car on a road open to use by the public.

In sum, the *Feres* doctrine is devoid of any statutory support and lacks meaningful foundational principles to guide courts in applying it consistently to new fact patterns. The widely divergent outcomes in

these cases are entirely inexplicable by reference to any of the plausible justifications for *Feres*.

C. Courts Of Appeals Repeatedly Lament The Inequities Caused By *Feres* And *Johnson* And Urge This Court To Relieve Them Of The Untenable Burden Of Implementing An Incoherent And Unjust Doctrine

This Court's authority to construct jurisdictional bars premised on public policy concerns is controversial. Courts in every circuit – including the courts below – have lamented the inequities and inconsistencies caused by the *Feres* doctrine, have challenged this Court's authority to adopt the extra-textual bar and the wisdom of the policies underlying the Court's continued adherence to it, and have urged this Court to reconsider *Feres*.

Respected circuit judges have forthrightly questioned this Court's authority to craft the *Feres* bar out of whole cloth. *See Taber*, 67 F.3d at 1038–39 (Calabresi, J.) ("That such a reading of the FTCA was exceedingly willful, and flew directly in the face of a relatively recent statute's language and legislative history, apparently did not trouble the Court much – intent, as it was, to make the FTCA 'fit' the legal landscape of the time. . . . [The Court's] willingness to ignore language, history, and the process of incremental law making (not to mention possible ways of dialoguing with Congress to discern the legislature's actual intent) was . . . remarkable.") (citation omitted); *see also Costo*, 248 F.3d at 871 (Ferguson, J., dissenting) ("When considering the *Feres* doctrine, . . . we are not dealing with a legislative action, but rather with a judicial re-writing of an unambiguous and constitutional statute. . . . This judicial re-

writing runs against our basic separation of powers principles . . . ."); *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987) (Noonan, J., concurring) ("The court . . . registers the unease caused by the judicial gloss on the congressional waiver of sovereign immunity."). *Cf. Rayonier Inc. v. United States*, 352 U.S. 315, 320 (1957) ("There is no justification for this Court to read exemptions into the [FTCA] beyond those provided by Congress.").

Lower courts also are troubled by the absence of credible rationales underlying the *Feres* doctrine. *See, e.g., Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J., concurring) ("The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundations upon which it stands. Prior panels of this court, of other courts of appeals, and numerous commentators have questioned the soundness of the *Feres* doctrine."); *Ruggiero v. United States*, 162 F. App'x 140, 142 (3d Cir. 2006) ("we have serious concerns about the analytical underpinnings of the *Feres* doctrine"); *Costo*, 248 F.3d at 866 ("These policy justifications and the doctrine itself have been heavily criticized by commentators and by this Court."); *Day*, 167 F.3d at 683 ("[a] few of *Feres*'s original reasons no longer seem so persuasive"); *Estate of McAllister v. United States*, 942 F.2d 1473, 1476, 1480 (9th Cir. 1991) ("A comparison of reasoning with outcomes in cases that have applied the doctrine validates these concerns: the results have not flowed easily from the doctrine's purported rationales. . . . In [affirming the district court], we follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine.") (citations omitted); *Persons*, 925 F.2d at 299

("[i]t would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres*").

Courts and scholars also have criticized the unprincipled expansion of the *Feres* doctrine to circumstances far beyond those contemplated by this Court in *Feres* and *Johnson*. *See, e.g.*, *Overton v. New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 100 (2d Cir. 2004) (Pooler, J., concurring) ("I write separately to warn against an undisciplined expansion of the *Feres* doctrine. . . . The application of *Feres* in collateral areas of military governance produces the most vivid examples of doctrinal over-reach."); *Richards v. United States*, 180 F.3d 564, 564–65 (3d Cir. 1999) (Rendell, J., dissenting from denial of rehearing en banc) ("This case presents yet another compelling argument for the abandonment of the *Feres* doctrine. *Feres* . . . is being employed by many courts on a regular basis to deny a military employee's recovery, and to prevent the government's accountability, for injuries sustained in connection with essentially civilian activities wholly unrelated to military service.") (citations omitted).

And courts – such as the district court below – lament time and again the inequities of barring tort recovery for service members simply by virtue of their status as active-duty military personnel. *See* App. 7a ("Several noted jurists and academics have raised objection to the *Feres* doctrine, and its application to this case seems particularly unfair.") (citations omitted); *see also McConnell*, 478 F.3d at 1098 ("[W]e note that we apply the *Feres* doctrine without relish.") (internal quotation marks and citation omitted); *Ruggiero*, 162 F. App'x at 143 ("We have no choice but to apply *Feres* to the instant case, despite the harshness of the result and our concern about the

doctrine's analytical foundations."); *Richards*, 176 F.3d at 657 ("Thus, we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it."); *Uhl v. Swanstrom*, 79 F.3d 751, 755 (8th Cir. 1996) ("[W]e find ourselves equally reluctant, yet legally bound, to hold that plaintiff's claims in the present case are nonjusticiable under the *Feres* doctrine."); *Miller v. United States*, 42 F.3d 297, 307–08 (5th Cir. 1995) ("The law is often unfair when viewed from the perspective of any one individual. Unfairness, however, must often be tolerated if we are to devise, implement, and maintain a system of laws whose application is certain and just in the grand scheme of things. Whether the *Feres* doctrine can be described as such is, we feel, open to question in certain cases."). The Eighth Circuit has gone so far as to appeal directly to the parties to rectify the injustice that resulted when it was compelled to bar a service member's claim under *Feres*. *See Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990) ("We take the liberty of urging, however, that the defendant, if it believes that some negligence may actually have occurred here, consider what steps can be appropriately taken to help the plaintiff. This is the kind of suggestion we rarely make, and it of course is not binding on anyone, but we hope it will be heeded.").

Finally, many lower courts have taken the extraordinary measure of urging this Court to reconsider its continued adherence to its misguided decision in *Feres*. *See* App. 7a ("The Court further . . . [pleads] that now is the time to revisit the *Feres* doctrine.");

see also McConnell, 478 F.3d at 1098 (Gould, J., concurring) ("[M]any might welcome the Supreme Court's clarification of the doctrine's application in the case of military-sponsored recreational programs."); *Richards*, 180 F.3d at 565 (Rendell, J., dissenting from denial of rehearing en banc) ("I urge the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in *Feres*"); *O'Neill*, 140 F.3d at 565 (Becker, C.J., statement sur denial of the petition for rehearing) ("I urge the Supreme Court to grant *certiorari* and reconsider *Feres*."). Doubtless no other precedent of this Court inspires such expressions among lower-court judges.

II. THE LOWER COURTS STRUGGLE TO APPLY *FERES* BECAUSE IT WAS WRONGLY DECIDED

"*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)). In *Feres*, this Court created a non-textual exception to governmental liability under the FTCA, ignoring or making redundant several statutory provisions in the process. Although a closely divided Court reaffirmed *Feres* in *Johnson*, the Court has largely abandoned the original justifications for the *Feres* doctrine. And rationalizations for *Feres* offered in subsequent cases no longer withstand scrutiny. The lack of textual guidance and the shifting, unpersuasive rationales have made it impossible for lower courts to implement the *Feres* doctrine consistently and fairly.

A. The *Feres* Doctrine Is Inconsistent With The FTCA's Text

The notion that Congress did not intend to waive the government's immunity from suits by active-duty military personnel finds no support in the FTCA's plain text. In fact, as Justice Scalia's dissent in *Johnson* explains, the statutory text indicates that Congress intended the Act to "render[] the United States liable to *all* persons, including servicemen." 481 U.S. at 693 (Scalia, J., dissenting).

The fact that Congress specifically considered and provided for the special requirements of the military indicates that it did not intend a flat, incident-to-service bar. *See id.* The FTCA confers general jurisdiction over tort claims against the U.S. government and includes "members of the military or naval forces of the United States" in its definition of federal employees and "the military departments" in its definition of federal agencies. 28 U.S.C. § 2671. The FTCA then enumerates a number of explicit exceptions, but nowhere precludes all suits brought by military personnel. *Id.* § 2680. Instead, the FTCA contains two limited exceptions that maintain governmental immunity for a subset of tort claims by members of the military: those arising out of "the combatant activities of the military or naval forces, or the Coast Guard, *during time of war*" and those "arising in a foreign country." *Id.* § 2680(j), (k) (emphasis added). As this Court reasoned in *Brooks v. United States*, 337 U.S. 49 (1949), the express FTCA exceptions are "too lengthy, specific, and close to the present problem" to support an inference that, notwithstanding the literal language of the statute, Congress intended to bar all suits brought by servicemen. *Id.* at 51. "The overseas and combatant activities exceptions

make this plain." *Id.* A third provision, not discussed in *Brooks*, excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

Together, these exceptions indicate Congress's intent to protect the military's autonomy and independence in areas in which lawsuits by service members could do the most harm – where injuries were incurred during combat, in operations overseas, or due to command decisions – but to permit suits to be brought against the military when these factors are not present. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 (1988) (per Scalia, J.) (exempting military contractors from tort liability based on the discretionary function exception to the FTCA rather than relying on *Feres*).

B. The Court's Extra-Textual Policy Justifications For The *Feres* Doctrine Cannot Displace Congressional Intent And, In Any Event, Are Unpersuasive

In *Feres*, this Court acknowledged the lack of textual support for a blanket bar on tort suits by military personnel, but nonetheless created such a bar by "construing [the FTCA] to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." 340 U.S. at 139. Thus, the Court's creation of a blanket bar was premised on its perception of sound policy, not on Congress's enactment of that policy. *See Johnson*, 481 U.S. at 692 (Scalia, J., dissenting) ("As it did almost four decades ago in *Feres* . . . , the Court today

provides several reasons why Congress might have been wise to exempt from the [FTCA] certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it.").

The *Johnson* majority reaffirmed the *Feres* doctrine, again without relying on the FTCA's text or legislative history. Instead, the majority attempted to salvage three policy justifications from the tarnished *Feres* opinion. *See* 481 U.S. at 688 ("This Court has emphasized three broad rationales underlying the *Feres* decision."). Nonetheless, the dissent in *Johnson* effectively refuted each justification retained by the *Johnson* majority. *See id.* at 695 (Scalia, J., dissenting) ("[T]he *Feres* rule is now sustained only by three disembodied estimations of what Congress must (despite what it enacted) have intended. They are bad estimations at that."). Lower courts and scholars similarly have eviscerated the policy grounds on which this Court based its reaffirmance of the *Feres* doctrine. *See supra* pp. 18–22.

There is no need to retread those refutations in detail in this petition – a summary suffices to convey their credence. The first policy rationale retained in *Johnson* was premised on the "distinctively federal" nature of the relationship between the government and members of the armed services. The *Johnson* majority concluded that Congress could not have intended the FTCA to apply to active-duty service members because it would be unfair for the service member's recovery to turn on the tort law of the state where he was injured, a matter outside of his control. *See* 481 U.S. at 689. About this reasoning, the dissent simply observed, "[t]he unfairness to servicemen of geographically varied recovery is, to speak bluntly,

an absurd justification, given that . . . nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery." *Id.* at 695–96 (Scalia, J., dissenting). The majority also suggested that the "distinctively federal" nature of the military relationship justified the *Feres* bar to promote the uniform application of federal law to apply to service members' suits. *Id.* at 689. The dissent, however, pointed out that this Court has "effectively disavowed this 'uniformity' justification – and rendered its benefits to military planning illusory – by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting *civilians* to recover for injuries caused by military negligence." *Id.* at 696 (Scalia, J., dissenting).

The *Johnson* Court's second justification for reaffirming the *Feres* bar was "the existence of . . . generous statutory disability and death benefits" for injured military personnel. *Id.* at 689. As the *Johnson* dissent made clear, however, "[t]he credibility of this rationale is undermined severely by the fact that both before and after *Feres* [the Court] permitted injured servicemen to bring FTCA suits, *even though they had been compensated under the [Veteran's Benefits Act].*" *Id.* at 697 (Scalia, J., dissenting). "In sum, 'the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable.'" *Id.* at 698 (Scalia, J., dissenting) (quoting *Hunt v. United States*, 636 F.2d 580, 598 (D.C. Cir. 1980)).

Finally, the *Johnson* Court invoked the special status of the military as a justification for reaffirming the *Feres* bar, indicating that courts are ill-equipped to inquire into military decision-making and that

attempting to do so could have a negative effect on military discipline. *See id.* at 690–91. Although that argument retains a superficial appeal, it is both over- and under-inclusive. Many suits – such as medical malpractice suits – brought by active-duty military personnel can be resolved without intrusion into uniquely military affairs. Indeed, the principal anomaly of the *Feres-Johnson* approach is that federal courts routinely resolve medical malpractice claims against the government for injuries suffered in military hospitals because *Feres* does not bar the claims of veterans or civilian dependents of military personnel. *See United States v. Brown*, 348 U.S. 110 (1954); *Del Rio*, 833 F.2d at 286; *see also Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (discussing the anomaly).

Furthermore, outside the realm of tort suits against the military, the federal judicial system is often called upon to review military issues in areas in which the court's inquiry is arguably far more intrusive than in an injury lawsuit. For instance, federal courts review court-martial proceedings in habeas. *See, e.g., Burns v. Wilson*, 346 U.S. 137, 142 (1953). Likewise, when soldiers bring claims for injunctive or declaratory relief from statutory and constitutional violations, the courts review military decision-making, often in great detail. *See* Uniform Code of Military Justice, 10 U.S.C. § 938 (providing complaint procedure for "[a]ny member of the armed forces who believes himself wronged by his commanding officer"); *see also Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973). Similar judicial oversight occurs when the Court of Federal Claims reviews cases involving interference with military career advantage. *See* 28 U.S.C. § 1491.

Nor is the *Feres* bar justified by solicitude for the importance of military discipline. *See Johnson*, 481 U.S. at 699 (Scalia, J., dissenting). Congress accounted for this important concern in the FTCA's text itself, creating an exception to the broad waiver of immunity for claims arising out of combatant activities, 28 U.S.C. § 2680(j), and in foreign countries, *id.* § 2680(k). In addition, the FTCA contains a general exception for discretionary actions. *Id.* § 2680(a); *see* Major Diedre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 6, 60–72 (2007) (discussing FTCA exceptions that apply to military personnel). The discretionary-action exception, in particular, protects government agents whose actions "involved the exercise of discretion in furtherance of public policy goals." *United States v. Gaubert*, 499 U.S. 315, 334 (1991). That textual exception protects even low-ranking personnel from having their orders second-guessed in court, while permitting service members with injuries caused outside the context of a discretionary decision to recover. *See* Brou, 192 MIL. L. REV. at 66–67.

Finally, as Justice Scalia has pointed out, while courts have assumed that Congress intended to protect discipline by preventing service members from bringing suits, it is entirely possible that "Congress thought that *barring* recovery by servicemen might adversely affect military discipline." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). After all, the effect of seeing a fellow service member's family denied compensation could reasonably be thought to hurt a unit's morale and cohesion. *See id.*

Feres was wrongly decided, and the Court should not have reaffirmed it in *Johnson*. The Court should grant certiorari to remedy those errors.

III. THE CONTINUED VIABILITY OF THE *FERES* BAR AFTER *JOHNSON* IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

The *Feres* doctrine has caused widespread confusion. Courts vary widely in classifying what acts constitute incident to service, how to determine if a service member is off-duty or on-duty, and which family members are covered by the *Feres* doctrine. Moreover, the inconsistencies and entreaties for this Court's reconsideration are increasing, not diminishing.

The frequency with which lower courts are required to apply *Feres* demonstrates the pressing need for this Court to bring clarity to the law. In addition to the present case, over the past three years, appeals courts have considered *Feres* doctrine cases at least 14 times. *See, e.g.*, *Wetherill v. Geren*, 616 F.3d 789 (8th Cir. 2010) (*Feres* bar to Title VII suit brought by a dual-status technician), *petition for cert. filed*, 79 U.S.L.W. 3310 (Nov. 9, 2010) (No. 10-638); *Bowers v. Wayne*, 615 F.3d 455 (6th Cir. 2010) (*Feres* bar to various discrimination claims brought by dual-status Air Force employee); *Zuress v. Donley*, 606 F.3d 1249 (9th Cir. 2010) (*Feres* bar to Title VII suit brought by a dual-status technician), *petition for cert. filed*, 79 U.S.L.W. 3149 (Sept. 16, 2010) (No. 10-374); *Payne v. United States*, 360 F. App'x 727 (8th Cir. 2010) (unpublished decision) (*Feres* bar to suit based on injuries incurred resulting from exposure to Agent Orange); *Brown v. United States*, 583 F.3d 916 (6th Cir. 2009) (*Feres* bar to family members for medical malpractice claim based on improper diagnosis of a parasitic infection in veteran); *Lovely v. United States*, 570 F.3d 778 (6th Cir. 2009) (*Feres* bar to claim of intentional infliction of emotional distress

brought by a member of the ROTC), *cert. denied*, 130 S. Ct. 1054 (2010); *Walsh v. United States*, 328 F. App'x 806 (3d Cir.) (unpublished decision) (*Feres* bar to claim based on negligence in failing to investigate arsenic poisoning), *cert. denied*, 130 S. Ct. 502 (2009); *Matthew v. United States*, 311 F. App'x 409 (2d Cir.) (unpublished decision) (*Feres* bar to suit for injuries arising from exposure to radioactive depleted uranium), *cert. denied*, 130 S. Ct. 101 (2009); *Williams v. Wynne*, 533 F.3d 360 (5th Cir. 2008) (*Feres* bar to Title VII claim brought by a dual-status technician); *Walch v. Adjutant Gen. Dep't*, 533 F.3d 289 (5th Cir. 2008) (*Feres* bar to Title VII and 42 U.S.C. §§ 1983 and 1985 claims brought by a dual-status technician); *Regan v. Starcraft Marine, LLC*, *supra* (no *Feres* bar to suit arising from injury during a recreational boating trip using Army facilities); *Geiger v. United States*, 266 F. App'x 688 (9th Cir. 2008) (unpublished decision) (*Feres* bar to suit for injury arising from alleged negligence in an automobile accident); *Diaz-Romero v. Mukasey*, 514 F.3d 115 (1st Cir. 2008) (*Feres* bar to various discrimination claims from employee of the Public Health Service, which qualifies as a uniformed service of the United States); *Willis v. Roche*, 256 F. App'x 534 (3d Cir. 2007) (unpublished decision) (*Feres* bar to Title VII claim brought by a dual-status technician).

This steady stream of cases is evidence that *Feres* and its progeny have failed to bring certainty or even predictability to this area. When the courts of at least one circuit make determinations of whether a claim must be barred by merely drawing analogies with the facts of previous cases, *see Schoenfeld*, 492 F.3d at 1019, it is no wonder that the issue is litigated and appealed over and over again. Without

clearer guidance, injured service members will continue to bring claims that ultimately will be barred, the government will continue to challenge claims that ultimately will be granted, and judges will continue to decry an unjust and unprincipled precedent of this Court. Such effects cause substantial damage to the justice system.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO REVISIT *FERES* AND *JOHNSON*

This case represents an excellent opportunity for this Court to reconsider, revise, or overrule *Feres*. The facts of the case are not in dispute. In particular, the gross negligence of the medical personnel responsible for SSgt. Witt's injuries was independently established and is uncontroverted. Only the *Feres* exception prevents petitioner from pursuing her claim against the government for the death of her husband caused by the government's negligence. Both the district court and the court of appeals expressly recognized the substantial injustice arising out of applying the *Feres* doctrine in this case. The district court called its application of the *Feres* doctrine "unfair," "irrational," and "inequitable," App. 7a, and the court of appeals noted that the circumstances underlying the lawsuit were "tragic," App. 2a.

Moreover, this case raises issues that fully implicate the many compelling criticisms of the Court's continued adherence to the *Feres* doctrine. SSgt. Witt was not engaged in any military activities when he was injured. At the time he was diagnosed with appendicitis, SSgt. Witt was moving to California under a Permanent Change of Station Order. He was between assignments on a protracted leave, had no official military duties, was not assigned to a particular unit, and was not scheduled to report for duty

until 20 days after his injury. The medical negligence claims underlying this suit are typical of claims brought by private parties under similar circumstances. SSgt. Witt's injuries are related to his military status only tangentially, and review of petitioner's claims would not require the courts to inquire into military affairs or undermine military discipline. Moreover, if Mrs. Witt or SSgt. Witt's dependents had been injured in the same hospital in precisely the same manner, they would have been able to pursue claims against the government under the FTCA.

In addition to being an appropriate vehicle for this Court to consider overruling *Feres*, this case would also allow the Court to reconsider *Feres* in a narrower way, by defining two important limitations on the *Feres* bar to recovery. First, the Court could clarify how a service member's leave status at the time of his injury affects whether his claim is barred, thus resolving one circuit split. *Compare Harvey v. United States*, 884 F.2d 857, 861 (5th Cir. 1989) (allowing suit for service member on leave), *with Madsen v. United States ex rel. U.S. Army, Corps of Eng'rs*, 841 F.2d 1011, 1012, 1014 (10th Cir. 1987) (barring suit for service member on leave).

Second, this case would allow the Court to consider whether medical malpractice claims should continue to be barred under *Feres*. The claims considered in *Feres* itself included two medical malpractice claims. *See* 340 U.S. at 137. But at least one of the rationales on which that decision rested has been rejected, and the rationale emphasized in *Johnson* – the preservation of military discipline – would seem to have little relation to medical malpractice claims. The Court thus could exclude medical malpractice cases from the *Feres* doctrine if it chose not to overturn *Feres* completely.

The issue presented in this case would not benefit from further percolation in the lower courts. The numerous ramifications of the *Feres* doctrine have been fully analyzed and criticized by lower courts and commentators. Since the Court reaffirmed *Feres*, the doctrine has become even more unworkable than it was when a bare majority upheld it in *Johnson*. At the same time, its frequent application has generated ever-greater confusion and injustice. This Court created the *Feres* doctrine, and the time is ripe for this Court to overrule it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 7, 2011

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-15339

ALEXIS WITT,
ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding
D.C. No. 2:08-cv-02024-JAM-KJM

Argued and Submitted May 11, 2010
San Francisco, California

[Filed May 14, 2010]

MEMORANDUM*

Before: SILVERMAN, FISHER and M. SMITH, Circuit Judges.

Alexis Witt appeals the district court's dismissal of her wrongful death action under the Federal Tort Claims Act (FTCA), alleging that her husband, a

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

member of the Air Force, died as the result of negligent medical treatment in a military hospital.

In *Feres v. United States*, the Supreme Court established an exception to the FTCA's waiver of sovereign immunity "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950). We have consistently held that claims for medical malpractice in military facilities are barred by *Feres*. *See, e.g., Persons v. United States*, 925 F.2d 292, 296 (9th Cir. 1991); *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980). Although Witt's husband may have been on some form of leave when the injury occurred, duty status is only one factor in the analysis. *See Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001). Moreover, we have specifically held that *Feres* applies even when service members were off duty, emphasizing that they received care in a military hospital based on their status as service members. *See, e.g., Persons*, 925 F.2d at 296; *Veillette*, 615 F.2d at 507. The same analysis controls the present case.

Although we acknowledge the tragic circumstances underlying this lawsuit, we are bound by precedent of the Supreme Court and our court to affirm the district court's dismissal.

The parties shall bear their own costs.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. 2:08-CV-02024 JAM-KJM

ALEXIS WITT,
ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

[Filed Feb. 10, 2009]

ORDER GRANTING MOTION TO DISMISS

Alexis Witt ("Plaintiff") brought this action against the United States of America ("Defendant"), on behalf of the Estate of Dean Witt, her deceased husband, for medical negligence. Defendant filed a Motion to Dismiss for Lack of Jurisdiction. Plaintiff opposed the Motion. For the reasons stated below, Defendant's Motion to Dismiss is GRANTED.[1]

BACKGROUND

On October 10, 2003, SSgt. Dean Witt ("Witt") was admitted to David Grant Medical Center at Travis Air Force Base for acute appendicitis. Compl. ¶ 6.3. Plaintiff alleges that as a result of negligent post-operative care, Witt experienced a lack of oxygen that caused severe damage to his brains and other organs and left him in a permanent vegetative state.

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 78-230(h).

Id. ¶ 6.4. Witt was removed from life support and died on January 9, 2004. *Id.*

On August 28, 2008, Plaintiff brought this action against Defendant for medical negligence. Docket at 1.

OPINION

Rule 12(b)(1) permits a Defendant to seek dismissal of an action for lack of subject-matter jurisdiction. Defendant argues that this Court lacks subject-matter jurisdiction because Defendant is immune from suit in this matter under the doctrine of sovereign immunity.

"The [Federal Tort Claims Act] waives traditional sovereign immunity for the tortious conduct of any Government employee." *Persons v. United States*, 925 F.2d 292, 294 (9th Cir. 1991). However, "the Supreme Court has carved out an exception for 'injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.'" *Id.* (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

The Ninth Circuit has repeatedly found that injury due to medical malpractice in military hospitals is "incident to service." *See, e.g., Jackson v. United States*, 110 F.3d 1484, 1489 (9th Cir. 1997) (hand injury); *Hata v. United States*, 23 F.3d 230, 235 (9th Cir. 1994) (heart attack); *Estate of McAllister v. United States*, 942 F.2d 1473, 1477-79 (9th Cir. 1991) (negligent supervision of mentally ill service member); *Persons*, 925 F.2d at 296 (suicide); *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987) (prenatal care); *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980) (motorcycle accident). This is true even when the underlying injury did not occur

during active duty.[2] *See Jackson*, 110 F.3d 1484, 1489 (9th Cir. 1997) ("[W]e have held that *Feres* bars suits for medical malpractice even when the treatment was not for military-related injuries.").

Plaintiff's reliance on cases where service members sued for medical malpractice based on care to dependent spouses and children at military hospitals is misplaced. When active duty service members bring suit for medical malpractice based on care received by their dependants, the *Feres* doctrine is not implicated. The simple fact that active duty service members can bring suit under the FTCA in some circumstances does not mean that they can bring suit when their injuries are incident to service under current precedent. *See Veillette*, 615 F.2d at 507 ("Although the fact that civilians are admitted to the hospital indicates that Veillette was not treated there solely because of his status, it does not follow that Veillette's treatment there was not incident to his military service.").

Plaintiff's reliance on the public policy rationale behind the *Feres* doctrine is also misplaced. Plaintiff states that the Court is required to consider the public policy factors behind *Feres*. Although in a case cited by Plaintiff, *Del Rio v. United States*, 833 F.2d 282, 288 (11th Cir. 1987), the Eleventh Circuit looked to the *Feres* policy rationales, the Ninth Circuit has specifically "shied away from attempts to apply these policy rationales." *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001). Instead, the Ninth

---

[2] Because Plaintiff received treatment in a military hospital by virtue of the fact that he was a service member, his duty status is not relevant in determining whether his injury was incident to service *See Persons v United States*, 925 F 2d at 296, *see also Veillette*, 615 F.2d at 507.

Circuit has outlined four factors to be considered in determining whether a suit should be barred by the *Feres* Doctrine:

> 1) the place where the negligent act occurred; 2) the duty status of the plaintiff when the negligent act occurred; 3) the benefits accruing to the plaintiff because of his status as a service member; and 4) the nature of the plaintiff's activities at the time the negligent act occurred.

Id. However, the purpose of applying this four factor test is to determine whether or not the service member's activity was incident to service. Because the Ninth Circuit has repeatedly stated that injury due to medical malpractice at a military hospital is incident to service, the Court need not go through each of the four factors. *See Hata*, 23 F.3d at 235 ("The Ninth Circuit has consistently barred as 'incident to service' claims arising out of medical care provided to service members in military hospitals.").

Finally, Plaintiff challenges the *Feres* Doctrine itself, arguing that it violates the equal protection clauses of Fifth and Fourteenth Amendments and the separation of powers doctrine. The Ninth Circuit has considered and rejected these arguments. *See Costo v. United States*, 248 F.3d 863 (9th Cir. 2001).

The alleged facts in the instant case are so egregious and the liability of the Defendant seems so clear that this Court did give serious consideration to Plaintiff's argument that this Court should allow this claim in spite of *Feres*. A 25 year old man who devoted his life to serving his country is dead through no fault of his own and his widow can not sue to recover for her loss. Instead, she is limited to a fraction of the recovery she might otherwise have received because of the *Feres* doctrine. *See United*

States v. Johnson, 481 U.S. 681, 703 (1987) (Scalia, J. dissenting). Several noted jurists and academics have raised objection to the *Feres* doctrine, *see, e.g.*, *Costo*, 248 F.3d at 869 Ferguson, J. dissenting); *Johnson*, 481 U.S. at 692 (Scalia, J. dissenting), and its application to this case seems particularly unfair. However, as wrong-headed as it may seem, this Court is duty-bound to follow precedent and abide by the decisions of the Ninth Circuit and Supreme Court. The Court encourages the Ninth Circuit to consider the *Feres* Doctrine en banc, especially in light of the inequitable result of its application in this case. *See Costo*, 248 F.3d at 869 ("[W]e join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes."). The Court further joins in Judge Ferguson's plea to the Supreme Court in *Costo*, that now is the time to revisit the *Feres* doctrine. Otherwise, *Feres* will once again have led to a result that can only be characterized as unfair and irrational.

ORDER

For the reasons stated above, Defendant's Motion to Dismiss is, reluctantly, GRANTED.

IT IS SO ORDERED.

Dated: February 9, 2009

/s/ JOHN A. MENDEZ
JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE

[Seal Omitted]

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS AIR FORCE LEGAL OPERATIONS AGNECY

[Mar. 7, 2008]

HP AFLOA/JACC
1501 Wilson Blvd., Ste 835
Arlington, VA 22209-2403

Matthew L. Mitton
Jones, Waldo, Holbrook &
McDonough, P.C.
170 S. Main Street, Suite 1500
Salt Lake City, UT 84101

Re: Medical Malpractice Claim of Alexis Witt
Air Force Claim No: Travis Air Force Base
05-687

Dear Mr. Mitton

I have considered Mrs. Witt's claim alleging negligence by SSgt Dean Witt's providers at David Grant Medical Center, Travis Air Force Base, California under the provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b); 2671-2680. Before proceeding, I wish to extend to Ms. Witt and SSgt Witt's family, personally and on behalf of the Air Force, our most profound sympathy for the unimaginably tragic loss of SSgt Witt. The magnitude of the death of a husband and father of two young children is beyond measure and beyond the power of mere words to weigh. His honorable and dedicated service has earned the eternal gratitude of the Air Force and his

nation. However, the law allows me no other choice but to deny Mrs. Witt's claim.

SSgt Witt was on active duty with the Air Force at all times that he received the medical care that is the subject of this claim. Thus, his care is considered to have been rendered "incident to service," and, under the rule established in the case of *Feres v. United States*, 340 U.S. 135 (1950), any claim arising from such care is barred. The "incident to service" bar of medical malpractice claims and lawsuits has consistently been applied since the *Feres* decision. *Jones v. United States*, 112 F.3d 299 (7th Cir. 1997); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Estate of McCallister v. United States*, 942 F.2d 1473 (9th Cir. 1991), *cert. denied* 112 S.Ct. 1164 (1992). The *Feres* bar also applies to claims by family members of an active duty service member that arise out of care rendered to the service member. *United States v. Shearer*, 473 U.S. 52 (1985); *Hata v. United States*, 23 F.3d 230 (9th Cir. 1994).

This is the final denial of your client's claim. I am required to inform you that if she is dissatisfied with this decision, you may file suit in an appropriate United States District Court not later than six months after the date of the mailing of this letter.

Sincerely

/s/ HILDEGARDE CONTE PERLSTEIN
HILDEGARDE CONTE PERLSTEIN
Chief Medical Law Branch
Claims & Tort Litigation Division
Air Force Legal Operations Agency

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-15339

ALEXIS WITT,
ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

[Filed Aug. 11, 2010]

ORDER

Before: SILVERMAN, FISHER and M. SMITH, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and request for rehearing en banc.

The full court has been advised of the request for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and request for rehearing en banc, filed June 28, 2010, is **DENIED**.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act provide:

28 U.S.C. § 1346. United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * * *

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

* * * * *

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

November 4, 2010

Mr. David C. Frederick
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036

Re: Alexis Witt, on Behalf of the Estate of Dean Witt, Deceased v. United States
Application No. 10A441

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on November 4, 2010 extended the time to and including January 7, 2011.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ Jeffrey Atkins

Jeffrey Atkins
Supervisor-Case Analyst
Division

[attached notification list omitted]

No. 10-885

In the Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should overrule *Feres* v. *United States*, 340 U.S. 135 (1950), and reject its interpretation of the Federal Torts Claims Act, 28 U.S.C. 1346(b), 2671-2680 *et seq.*, which has been in place for more than 60 years.

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In the Supreme Court of the United States

No. 10-885

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 379 Fed. Appx. 559. The opinion of the district court (Pet. App. 3a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2010. A petition for rehearing was denied on August 11, 2010 (Pet. App. 10a). On November 4, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 7, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

At all times relevant to this case, petitioner's decedent, Staff Sergeant (SSgt.) Dean Witt, was on active duty with the Air Force. Pursuant to military orders, SSgt. Witt left his assignment at Hill Air Force Base (AFB) on or about August 5, 2003, and was on temporary duty (TDY en route), performing military functions, from August 6, 2003, until October 1, 2003. See No. 2:08-cv-02024, Docket entry No. 12-1, Exh. A (E.D. Cal. Dec. 28, 2008). His orders required him to report to his new commander at Travis AFB no later than October 30, 2003. See *ibid.* On October 10, 2003, SSgt. Witt was in the process of moving his family to California pursuant to those orders. See *id.* No. 12-1, ¶ 2.

On October 10, 2003, SSgt. Witt was admitted to the David Grant Medical Center at Travis AFB for acute appendicitis. Petitioner alleges that as a result of negligent post-operative care occurring on the same date, SSgt. Witt suffered a lack of oxygen that caused severe damage to his brain and led to his death on January 9, 2004. SSgt. Witt was on active duty when the alleged malpractice occurred. On October 11, 2003, he was placed on the Temporary Disability Retirement List (TDRL). He remained on TDRL until his death. Pet. App. 3a-4a; No. 2:08-cv-02024, Docket entry No. 8-2, at 2 (E.D. Cal. Nov. 3, 2008).

After the Air Force denied her administrative claim (Pet. 8a-9a), petitioner filed this action on behalf of SSgt. Witt's estate under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680 *et seq.* See Pet. App. 1a, 4a. The United States moved to dismiss the complaint pursuant to *Feres* v. *United States*, 340 U.S. 135 (1950), which held that the FTCA does not authorize suits by or on behalf of service members that result from

service-related activity. See Pet. App. 4a. The district court granted the motion to dismiss. *Id.* at 3a-7a. The court explained that, where as here, a service member "received treatment in a military hospital by virtue of the fact that he was a service member," *id.* at 5a n.2, "injury due to medical malpractice * * * is 'incident to service.'" *Id.* at 4a. Plaintiff appealed, and the court of appeals affirmed in an unpublished, non-precedential, memorandum opinion that reiterated the district court's rationale for dismissing the complaint. *Id.* at 1a-2a.

As a result of SSgt. Witt's death, petitioner received $250,000 in benefits from his military life insurance policy. No. 2:08-cv-02024, Docket entry No. 8-2, at 6 (E.D. Cal. Nov. 3, 2008). Under the Veterans Benefits Act (VBA), 38 U.S.C. 1110, petitioner also is currently receiving $1154 per month tax-free, payable for life unless she remarries before age 57. See 38 U.S.C. 1311(a)(1) (Supp. 2009). SSgt. Witt's two children are each receiving an additional $286 per month tax-free under the VBA, payable until they become 18 years old. See 38 U.S.C. 1311(b) (Supp. 2009).

Petitioner also received a statutory death payment of $100,000 under the Death Benefit Enhancements of the National Defense Authorization Act for Fiscal Year 2006, Public Law No. 109-163, 119 Stat. 3316, Sec. 664. In addition, petitioner and her children are also eligible for medical care under the TRICARE military program, with the same health plan options that they had before SSgt. Witt's death. See 10 U.S.C. 1071-1110 (2006 & Supp. 2009). They also are entitled to receive Dependent Education Assistance of $925 per month for up to 45 months for full time attendance at a qualifying college or university. See 10 U.S.C. 2141-2149.

ARGUMENT

Petitioner argues (Pet. 6-33) that this Court should overrule *Feres* v. *United States*, 340 U.S. 135 (1950), or declare it inapplicable to medical malpractice claims. Two of the three cases consolidated for review in *Feres* involved malpractice claims, however, *id.* at 137, and the Court specifically reaffirmed *Feres* in *Johnson* v. *United States*, 481 U.S. 681, 686 (1987). Since that time, Congress has rejected numerous bills that would have overruled *Feres* or made it inapplicable to medical malpractice cases. And petitioner's contentions that *Feres* has proved unworkable are unfounded. For these and other reasons explained below, overruling *Feres* would violate principles of *stare decisis*. In any event, *Feres* correctly held that the FTCA, 28 U.S.C. 1346(b), 2671-2680 *et seq.*, does not waive the sovereign immunity of the United States for suits on behalf of military personnel based on service-related injuries. The courts of appeals agree that suits seeking recovery for medical malpractice suffered by service members on active duty fall in that category. The Court should therefore deny the petition for a writ of certiorari.

1. "[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) (citation omitted). *Stare decisis* "ensures that the 'the law will not merely change erratically' and 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.'" *Ibid.* (citation omitted). Thus, any decision to overrule precedent "demands special justification." *Ibid.* (citation omitted). Moreover, *stare decisis* has "special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legisla-

tive power is implicated, and Congress remains free to alter what [the Court has] done." *Id.* at 172-173. Accordingly, "the burden borne by the party advocating the abandonment of an established precedent is [even] greater where the Court is asked to overrule a point of statutory construction." *Id.* at 172. Petitioner cannot carry that heavy burden.

Petitioner's arguments about whether *Feres* was correctly decided "were examined and discussed with great care" in *Johnson*. *Patterson*, 491 U.S. at 171. In *Johnson*, the Court noted that Congress had not acted to modify *Feres* "in the close to 40 years since it was articulated, even though, as the Court had noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent.'" 481 U.S. at 686 (citation omitted). As the Court explained, the Court "ha[d] never deviated" from *Feres*'s holding that service members may not sue the United States for injuries 'that arise out of or are in the course of activity incident to service.'" *Ibid.* (quoting *Feres*, 340 U.S. at 146). The Court thus "decline[d] to modify the doctrine at [that] late date," *id.* at 688, almost 25 years ago. For the Court to reconsider *Feres* now, based on the same arguments rejected in *Johnson*, would particularly disserve the goal of maintaining a stable judicial system. Only confusion and instability would occur if the Court overruled a "well established" precedent like Feres. See *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 670 (1977); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008).

Moreover, in the almost 25 years since this Court reaffirmed *Feres* in *Johnson*, Congress has rejected numerous bills that would have limited *Feres*, including by

rendering it inapplicable to medical malpractice claims.[1] Congress's long acquiescence in *Feres* was one of the principal reasons why the Court reaffirmed *Feres* in *Johnson*. See 481 U.S. at 686. Congress's repeated refusal to modify *Feres* since *Johnson* provides even more compelling reasons for not disturbing *Feres*, and further evidence that *Feres* represents a correct interpretation of the FTCA. See *John R. Sand & Gravel Co.*, 552 U.S.

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[1] See H.R. 1478, 111th Cong., 1st Sess. (2009); S. 1374, 111th Cong., 1st Sess (2009); H.R. 6093, 110th Cong., 2d Sess. (2008); H.R. 4603, 109th Cong., 1st Sess. (2005) (proposed addition of Section 2161(c)(1)(E) to the Public Health Service Act, 42 U.S.C. 300aa-1 *et seq.*); H.R. 2684, 107th Cong., 1st Sess. (2001); H.R. 3407, 102d Cong., 1st Sess. (1991); H.R. 536, 101st Cong., 1st Sess. (1989); S. 2490, 100th Cong., 2d Sess. (1988); S. 347, 100th Cong., 1st Sess. (1987); H.R. 1341, 100th Cong., 1st Sess. (1987); H.R. 1054, 100th Cong., 1st Sess. (1987). Congress held extensive hearings on several of those bills. See *Carmelo Rodriquez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong., 1st Sess. (2009); *The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong., 2d Sess. (2002); *Claims for Negligent Medical Care Provided Members of the Armed Forces: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991); *Medical Malpractice Suits for Armed Services Personnel: Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988); *Compensation for Victims of Military Malpractice: Hearing Before the Military Personnel and Compensation Comm. of the H. Comm. on Armed Services*, 100th Cong., 1st Sess. (1987); *Military Medical Malpractice and Liability for Injuries Resulting From the Atomic Weapons Testing Program: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987).

at 139; *Watson* v. *United States*, 552 U.S. 74, 82-83 (2007); *Shepard* v. *United States*, 544 U.S. 13, 23 (2005).[2]

Although overruling a decision may be warranted if it has proven "unworkable" or "inconsistent with the sense of justice or with the social welfare," *Patterson*, 491 U.S. at 173-174 (citation omitted), because the Court declined to overrule *Feres* almost 25 years ago in *Johnson*, it would take a particularly compelling showing of such flaws for the Court to overrule it now. In fact, *Feres* suffers from no such flaws. On the contrary, it provides a straightforward rule of decision that courts have been able to apply with relative ease. See *United States* v. *Stanley*, 483 U.S. 669, 683 (1987) (noting that *Feres*'s incident-to-service test "provides a line that is relatively clear" and avoids undue intrusion into the military mission). For that reason, this Court in *Stanley* adopted the *Feres* test as the applicable rule of law for determining *Bivens* liability in suits by service members against other service members. See *ibid.* Only a handful of *Feres* cases have made their way to this Court in the 60-plus years since *Feres* was decided, and those

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[2] Congress has also enacted legislation based on the understanding that *Feres* governs tort claims by military personnel. In 1981, Congress enacted Pub. L. No. 97-124, 95 Stat. 1666, which amended the tort claims provisions of the United States Code "to provide the National Guard the same coverage under the Torts Claims Act as now exists for the Armed Forces." H.R. Rep. No. 384, 97th Cong., 1st Sess., Pt. 1, at 2 (1981). The House Report accompanying the legislation stated that "[i]t is well settled that claims for injuries to servicemen that 'arise out of or are in the course of activity incident to service' may not be brought under the" FTCA pursuant to *Feres*, and that "[i]t is the intent of the Committee that the rule of the *Feres* case apply to the acts or omissions of National Guard personnel." *Id.* at 5.

cases represent nothing more than the fine-tuning any legal doctrine can require from time to time.[3]

The *Feres* doctrine is particularly well-settled in the context involved here—medical malpractice actions on behalf of active-duty service members. The courts of appeals all recognize that such claims are barred. See, *e.g.*, *Borden* v. *Veterans Admin.*, 41 F.3d 763 (1st Cir. 1994); *Matthew* v. *United States*, 311 Fed. Appx. 409 (2d Cir.), cert. denied, 130 S. Ct. 101 (2009); *Loughney* v. *United States*, 839 F.2d 186 (3d Cir. 1988); *Appelhans* v. *United States*, 877 F.2d 309 (4th Cir. 1989); *Schoemer* v. *United States*, 59 F.3d 26 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Molnar* v. *United States*, 210 F.3d 372 (6th Cir.), cert. denied, 531 U.S. 956 (2000); *Jones* v. *United States*, 112 F.3d 299 (7th Cir.), cert. denied, 522 U.S. 865 (1997); *Sloan* v. *United States*, 208 F.3d 218

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[3] In *United States* v. *Brown*, 348 U.S. 110 (1954), the Court held that *Feres* does not bar FTCA claims by discharged service members if the claims arise out of activity that occurred after discharge. In *United States* v. *Shearer*, 473 U.S. 52 (1985), the Court held that *Feres* bars FTCA claims based on injuries inflicted by other service members, because such suits would require the courts to second-guess core military judgments regarding the supervision and control of military personnel. In *Johnson*, *supra*, the Court held that *Feres* bars FTCA claims on behalf of service members even for injuries caused by civilian government employees. The Court's remaining *Feres* cases have concerned whether the "incident to service" test should be extended to other contexts besides FTCA suits on behalf of service members. See *Stanley*, *supra* (the "incident to service" test governs whether service members may bring *Bivens* claims); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (same); *Stencel Aero Eng'g Corp.*, *supra* (*Feres* bars indemnification action against United States for damages paid by third party to service member who was injured in the course of military service); *United States* v. *Munoz*, 374 U.S. 150 (1963) (*Feres* not extended to bar FTCA suits by federal prisoners for injuries in federal prison resulting from negligence of government employees).

(8th Cir. 2000); *Carter* v. *United States*, 182 F.3d 924 (9th Cir.), cert. denied, 528 U.S. 931 (1999); *Forgette* v. *United States*, 35 F.3d 574 (10th Cir. 1994), cert. denied, 513 U.S. 1113 (1995); *Jimenez* v. *United States*, 158 F.3d 1228 (11th Cir. 1998); *Antoine* v. *United States*, 990 F.2d 1377 (D.C. Cir. 1993); *Mackie* v. *United States*, 172 Ct. Cl. 393 (Ct. Cl. 1965). That is no surprise, given that two of the three cases consolidated for review in *Feres* itself were medical malpractice cases. See *Feres*, 340 U.S. at 137.[4]

A decision may also be overruled when it is incompatible with the law as it has developed in other areas. See *Patterson*, 491 U.S. at 173-174. But that is far from the situation with *Feres*. On the contrary, *Feres* has been woven into the fabric of the law in a number of different contexts. For example, as noted above, the Court has adopted *Feres's* "incident to service" test as the governing rule for *Bivens* claims brought by one service member against another. See *Stanley*, 483 U.S. at 684. The Court has also adopted the *Feres* test to govern when an indemnification action may be brought against the United States for damages paid by third parties to service members. See *Stencel Aero Eng'g Corp.*, *supra*. Similarly, lower courts have held that the *Feres* test

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[4] Because the law is so well settled, most FTCA suits on behalf of active-duty service members alleging military medical malpractice concede that *Feres* bars the claims and are filed in anticipation of challenging *Feres* in this Court. Those cases typically produce unpublished per curiam or memorandum opinions from the courts of appeals and a subsequent denial of certiorari. See, *e.g.*, *Zmysly* v. *United States*, 130 S. Ct. 3324 (2010) (No. 09-1108); *Hafterson* v. *United States*, 130 S. Ct. 416 (2009) (No. 09-240); *Matthew* v. *Department of Army*, 130 S. Ct. 101 (2009) (No. 08-1451); *Schoemer* v. *United States*, 516 U.S. 989 (1995) (No. 95-528); *Hayes* v. *United States*, 516 U.S. 814 (1995) (No. 94-1957); *Forgette* v. *United States*, 513 U.S. 1113 (1995) (No. 94-985).

governs whether the United States may be sued in tort for the death or injury of a foreign service member. See, *e.g.*, *Daberkow* v. *United States*, 581 F.2d 785 (9th Cir. 1978). See also *Backman* v. *United States*, 153 F.3d 726 (10th Cir. 1998) (*Feres* test applies to tort actions brought by commissioned officers of the Public Health Service); *Scheppan* v. *United States*, 810 F.2d 461 (4th Cir. 1987) (same). This Court should therefore be particularly hesitant to overrule *Feres*, because doing so would unsettle the law in a number of areas. See *California* v. *FERC*, 495 U.S. 490, 499 (1990) (declining to overrule a precedent because the Court had "employed" it "with approval in a range of decisions" in the same and "other contexts").

2. a. In support of her argument that *Feres* should be overruled, petitioner contends (Pet. 7-11) that the courts of appeals apply inconsistent legal tests in determining whether a suit is barred. That contention is incorrect. All of the circuits recognize that, as *Feres* itself held, the fundamental inquiry is whether the service member's injury arose out of activity "incident to service." 340 U.S. at 146. The circuits also uniformly understand, as this Court made clear in *United States* v. *Shearer*, 473 U.S. 52 (1985), that the inquiry "cannot be reduced to a few bright-line rules," but instead requires analysis of the facts and circumstances of "each case," "examined in light of the [FTCA] as it has been construed in *Feres* and subsequent cases." *Id.* at 57.

All of the courts of appeals follow the fact-specific approach described in *Shearer*. See *Costo* v. *United States*, 248 F.3d 863, 867 (9th Cir.), cert. denied, 534 U.S. 1078 (2002); *Pringle* v. *United States*, 208 F.3d 1220, 1224 (10th Cir. 2000); *Fleming* v. *USPS, Postmaster Gen.*, 186 F.3d 697, 699-700 (6th Cir. 1999); *Richards*

v. *United States*, 176 F.3d 652, 655 (3d Cir.), cert. denied, 528 U.S. 1136 (1999); *Whitley* v. *United States*, 170 F.3d 1061, 1070-1075 (11th Cir. 1999); *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-683 (1st Cir. 1999); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996); *Wake* v. *United States*, 89 F.3d 53, 58 (2d Cir. 1996); *Schoemer*, 59 F.3d at 28; *Stephenson* v. *Stone*, 21 F.3d 159, 162-163 (7th Cir. 1994); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994); *Brown* v. *United States*, 739 F.2d 362, 367-368 (8th Cir.), cert. denied, 473 U.S. 904 (1984). The most frequently recurring considerations include the service member's duty status at the time he or she was injured, see, *e.g.*, *Stewart*, 90 F.3d at 104; *Schoemer*, 59 F.3d at 29; *Brown*, 739 F.2d at 367; the location of the tort, see, *e.g.*, *Whitley*, 170 F.3d at 1070; *Day*, 167 F.3d at 182; the activity in which the service member was involved, see, *e.g.*, *Fleming*, 186 F.3d at 700; *Richards*, 176 F.3d at 656; *Wake*, 89 F.3d at 61; whether the service member's conduct was subject to military regulations, see, *e.g.*, *Pringle*, 208 F.3d at 1226; *Stephenson*, 21 F.3d at 163; and whether the service member's activity arose out of military life or was a benefit of military service, see, *e.g.*, *Costo*, 248 F.3d at 868; *Verma*, 19 F.3d at 648.

Petitioner incorrectly argues (Pet. 7-8, 10) that some circuits have developed their own, inconsistent multifactor tests for determining whether an injury is service-related. Although some circuits (such as the First, Fifth, Ninth, and Eleventh) have identified specific factors that courts should consider, those circuits all also require consideration of the "totality of the circumstances," *Costo*, 248 F.3d at 867, recognizing that "[n]o single element * * * is decisive," *Day*, 167 F.3d

at 682; accord *Whitley*, 170 F.3d at 1075; *Schoemer*, 59 F.3d at 28.

Petitioner also contends (Pet. 8-10) that the courts of appeals are confused about whether or to what extent the rationales that support the *Feres* doctrine enter into the analysis. No confusion exists. In *Johnson* and *Stanley*, this Court made clear that a suit is barred whenever the injury arose out of activity incident to service, regardless of whether precluding the particular suit would further the *Feres* rationales. See *Johnson*, 481 U.S. at 686-688; *Stanley*, 483 U.S. at 682-683. Consistent with those cases, the courts of appeals consider the *Feres* rationales only as additional support for a determination whether an injury is service-related or in deciding whether *Feres* extends beyond the traditional paradigm of suits on behalf of service members for service-related injuries. Thus, contrary to petitioner's assertion that the Ninth and Tenth Circuits "ignore the rationales" (Pet. 9), those courts invoke the rationales to buttress their conclusions that injuries are service-related. See, *e.g.*, *Pringle*, 208 F.3d at 1227; *Stephenson*, 21 F.3d at 163-164. Also contrary to petitioner's contention (Pet. 8-9), the Fourth and Sixth Circuits consider the rationales for the same purposes. Thus, in *Romero by Romero* v. *United States*, 954 F.2d 223, 226 (4th Cir. 1992), and *Brown* v. *United States*, 462 F.3d 609, 613 (6th Cir. 2006), those courts considered the rationales in deciding whether *Feres* extends to claims brought on behalf of the *children* of service members (rather than service members themselves). In cases involving the traditional *Feres* paradigm, those circuits have made clear that the critical inquiry is whether the injury arose out of "activity incident to military service," *Fleming*, 186 F.3d at 699, and that resolution of that inquiry turns

on all the "circumstances of th[e] case," *Stewart*, 90 F.3d at 104.

b. Petitioner further contends (Pet. 11-18) that the courts of appeals have reached conflicting results when applying *Feres* in a few contexts far afield from this case. Even if that were true, it would signal only that this Court's review was needed to resolve the conflicts; it would not justify overruling *Feres*, particularly in this case, which involves a context in which application of the doctrine is well settled. In any event, the purported circuit conflicts identified by petitioner do not exist.

For example, the prenatal care cases that petitioner cites (Pet. 11-12) are not inconsistent with one another. Courts of appeals have held that FTCA claims on behalf of a service member's child are barred when the claims are derivative of the parent's injury or treatment. See *Irvin* v. *United States*, 845 F.2d 126, 131 (6th Cir.), cert. denied, 488 U.S. 975 (1988)); *Scales* v. *United States*, 685 F.2d 970, 974 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983). Claims on behalf of the child are not barred, however, when the injury to the child resulted from independent negligence in treatment directed towards the health of the child alone. See *Brown*, 462 F.3d at 614-615 (distinguishing *Irvin*); *Romero by Romero*, 954 F.2d at 225, 226 (distinguishing *Irvin* and *Scales*); *Del Rio* v. *United States*, 833 F.2d 282, 286-287 (11th Cir. 1987) (rejecting claim that children's injury was derived from mother's injury); see also *Mossow* v. *United States*, 987 F.2d 1365, 1369 (8th Cir. 1993) (applying same rule to legal malpractice claim on behalf of child).

Petitioner is also incorrect in asserting (Pet. 14-15) that a conflict exists among decisions addressing injuries arising out of recreational activities. In *Kelly* v. *Panama Canal Commission*, 26 F.3d 597 (1994), the

Fifth Circuit held that *Feres* did not bar an FTCA claim brought by the survivors of a service member who was killed while engaged in a recreational sailing trip. The key facts were that the service member "was sailing a privately owned catamaran, and no special military rules or regulations applied to govern the conditions of his sailing." *Id.* at 600. Likewise, in *Regan* v. *Starcraft Marine, LLC*, 524 F.3d 627 (5th Cir. 2008), *Feres* did not bar the suit because the injured service member was a mere guest on a boat that another service member had rented from a military recreational facility. See *id.* at 640. The injured service member's presence served no military function, *ibid.*, and guests did not need to be service members, so the service member's "relationship to the Army was coincidental to his injuries," *id.* at 643. In *Costo*, *supra*, and *Bon* v. *United States*, 802 F.2d 1092 (9th Cir. 1986), in contrast, *Feres* barred the suits because the service members were injured while taking advantage, in their military capacities, of recreational activities that were under military control. *See Costo*, 248 F.3d at 867 (noting that the military rafting trip in question was provided to the deceased service member "as a benefit of military service" and that the program "was under the command of the base's commanding officer"); *Bon*, 802 F.2d at 1095 (noting that the injured service member "enjoyed the use of the Special Services Center solely by virtue of her status as a member of the military," and that the Center "was directly under the control of the commanding officer of the San Diego Naval Training Center").

Also, contrary to petitioner's assertion (Pet. 15-16), *O'Neill* v. *United States*, 140 F.3d 564 (3d Cir.) (Becker, C.J., statement sur denial of petition for rehearing en banc), cert. denied, 525 U.S. 962 (1998), and *Pringle*,

supra, do not conflict with *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991); *Durant* v. *Neneman*, 884 F.2d 1350 (10th Cir. 1989), cert. denied, 493 U.S. 1024 (1990); and *Brown* v. *United States*, 739 F.2d 362 (8th Cir. 1984). In *O'Neill*, *Feres* barred an FTCA suit arising out of a service member's death because the deceased was killed in her military quarters by another service member whom the military had allegedly failed to supervise properly. See 140 F.3d at 565 n.**; U.S. Brief, *O'Neil*, No. 97-7030 (3d Cir.), 1997 WL 33710271, at *3. Similarly, in *Pringle*, *Feres* barred the suit because the service member's injuries resulted from the government's allegedly negligent failure to provide adequate protection at a military club that was located on base, provided for the benefit of service members, and under the operational control of the base commander. 208 F.3d at 1222, 1226-1227. By contrast, the claims that the courts permitted to go forward in *Lutz*, *Durant*, and *Brown*, did not allege negligent supervision of military personnel or negligent operation of a government program. Indeed, the claims were not even against the government, but were instead against other service members. See *Lutz*, 944 F.2d at 1479-1480; *Durant*, 884 F.2d at 1351-1352; *Brown*, 739 F.2d at 363-364.[5]

Petitioner likewise fails to identify (Br. 17-18) any conflict between *Richards*, *supra*, and *Parker* v. *United States*, 611 F.2d 1007 (5th Cir. 1980), or *Schoenfeld* v. *Quamme*, 492 F.3d 1016 (9th Cir. 2007). In *Richards*, *Feres* barred an FTCA suit where a service member was killed in an on-base collision with a military truck while leaving his duty station at the end of his work day. The

[5] The court in *Brown* held that the claim against the United States for negligent supervision of the service members who injured Brown was barred under *Feres*. 739 F.2d at 364.

key fact, the Third Circuit held, was that the decedent was present at the location of the accident because of his military status and not merely "as a member of the general public." 176 F.3d at 656. By contrast, in *Schoenfeld*, *Feres* was inapplicable because the injured service member was on liberty and was not present on the road where the accident occurred because of his military status. See 492 F.3d at 1024-1025. Similarly, in *Parker*, *Feres* was inapplicable because the injured service member was on a four to five day pass when his vehicle was hit, see 611 F.2d at 1014, and his connection with the military when injured was thus much more attenuated than that of the service member in *Richards*, who was not on a pass or furlough, see 176 F.3d at 654.

3. Even if principles of *stare decisis* did not preclude reevaluation of *Feres*, the decision should not be overruled because it was correctly decided. Contrary to petitioner's contentions (Pet. 24-28), the reasons the Court identified in *Johnson* for why *Feres* is a valid interpretation of the FTCA, see 481 U.S. at 688-691, remain sound.

First, because "[t]he relationship between the Government and members of its armed forces is distinctively federal in character," it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." *Johnson*, 481 U.S. at 689 (citation and internal quotation marks omitted; brackets in original). As the Court explained in *Feres*, "[S]tates have differing provisions as to limitations of liability and different doctrines as to assumption of risk, fellow-servant rules and contributory or comparative negligence." 340 U.S. at 143. As a result, "[i]t would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over

which they have no control and to laws which fluctuate in existence and value." *Ibid.* Moreover, allowing disparate recovery based on the fortuity of where each service member's injury occurred could undermine the trust and goodwill among service members that is essential to military success. To allow service members who are injured in the United States to bring FTCA actions, while service members injured in combat overseas are barred from such recovery, see 28 U.S.C. 2680(j), would severely test that trust and goodwill, and potentially create serious morale problems in the military.

Second, as the Court noted in *Johnson*, "[t]hose injured during the course of activity incident to service not only receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift [and] efficient, normally requir[ing] no litigation." 481 U.S. at 690 (citation and internal quotation marks omitted; brackets in original). It is "difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA." *Ibid.* As the Court explained in *Feres*, if Congress had intended the FTCA to provide a statutory tort remedy for injuries to service members that arise from service-related activity, "it is difficult to see why [Congress] should have omitted any provision to adjust these two types of remedy to each another." 340 U.S. at 144. "The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Ibid.*

Third, "suits brought by service members against the Government for [service-related] injuries * * * are barred by the *Feres* doctrine because they are the

'*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Johnson*, 481 U.S. at 690 (citation omitted). "Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *Id.* at 691 (footnote omitted).

The *Johnson* dissenters did not dispute "the possibility that some suits brought by servicemen will adversely affect military discipline." 481 U.S. at 699. They considered that point insufficient to support *Feres* because *Feres* does not bar courts from reviewing military decisions in FTCA suits by civilians. See *id.* at 700. As the Court noted in *Johnson*, however, "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and one's country." *Id.* at 691. As a result, "[s]uits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." *Ibid.* That concern is not implicated by FTCA suits based on injuries to civilians.[6]

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[6] Petitioner argues (Pet. 27) that the existence of habeas review of court-martial proceedings and the ability of service members to seek injunctive or declaratory relief for constitutional violations in certain circumstances shows that federal court review is not destructive of military discipline. That argument overlooks that habeas review of court-martial proceedings is limited to determining "whether the military have given fair consideration" to the service member's claims, and federal courts may not reexamine the merits of the claims. *Burns* v. *Wilson*, 346 U.S. 137, 144 (1953) (citation omitted). Similarly, courts give substantial deference to military judgments in adjudicating consti-

Petitioner also mistakenly argues (Pet. 23-24) that *Feres*'s interpretation of the FTCA lacks support in the statute's language. As the Court explained in *Feres*, the FTCA states that the United States shall be liable under the Act "in the same manner and to the same extent as a private individual under like circumstances." 340 U.S. at 141 (citing 28 U.S.C. 2674(a)). There is "no liability of a 'private individual' even remotely analogous" to a claim by or on behalf of a service member who is injured as a result of service-related activity. *Ibid.*[7]

Petitioner contends (Pet. 23-24) that the FTCA should not be read to exclude from its waiver of sovereign immunity service-related claims on behalf of service members because the statute contains other provisions (28 U.S.C. 2680(a), (j) and (k)) that also exempt some claims by service members. That argument is not persuasive. Numerous FTCA exclusions overlap with one another, including the very exclusions on which petitioner relies. Section 2680(j)'s exemptions for claims arising out of combatant activities during time of war overlaps with Section 2680(k)'s exemption for claims arising in a foreign country, and both of those exemptions in turn overlap with Section 2680(a), the discre-

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tutional and civil rights actions by service members for injunctive or declaratory relief. See, *e.g.*, *Winter* v. *NRDC*, 555 U.S. 7 (2008); *Goldman* v. *Weinberger*, 475 U.S. 503 (1986).

[7] Petitioner wrongly asserts that the Court in *Feres* "acknowledged the lack of textual support for" its holding. Pet. 24. Petitioner bases that contention on *Feres*'s statement that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres*, 340 U.S. at 139. That statement is not an acknowledgment of a lack of textual support, but a clear indication that the Court believed that the rule it adopted was consistent with the FTCA's text.

tionary function exception. Similarly, the discretionary function exemption overlaps with the exemptions for claims arising from the imposition of a quarantine, 28 U.S.C. 2680(f), and regulation of the monetary system, 28 U.S.C. 2680(i). Thus, overlap among the different exemptions is no reason to read any of them out of the statute.

4. Petitioner also errs in arguing (Pet. 18-22) that criticisms of *Feres* raised by some lower court judges justify overruling the decision. Petitioner first invokes (Pet. 18-20) the contentions of some judges that *Feres*'s interpretation of the FTCA lacks a textual basis and is not justified by the policy rationales explicated by this Court. As discussed above, those criticisms are unfounded. See pp. 16-20, *supra*. And, even if the criticisms were valid, they would at most suggest that *Feres* was incorrectly decided, which would not be a sufficient justification for overruling it, particularly since its interpretation of the FTCA has been in place for more than 60 years.

Petitioner also relies (Pet. 20) on the criticism that lower courts have extended *Feres* to circumstances beyond those contemplated by this Court. Even if that criticism were valid, it would not justify overruling *Feres*; instead, at most it would suggest that the Court might consider whether to address any asserted overextension of the doctrine by making clear its proper scope. Moreover, that criticism has no relevance to this case. Application of *Feres* to medical malpractice suits is well within the scope contemplated by this Court, since, as discussed above, two of the decisions involved in *Feres* itself involved malpractice claims. See p. 9, *supra*.

Finally, the purported inequities of barring tort recoveries by military personnel for service-related injuries (Pet. 20-21) do not justify overruling *Feres*. Such policy issues are the concern of Congress rather than the courts, and Congress has for 60 years declined to overturn or limit *Feres*, despite numerous opportunities to do so. See pp. 5-6 & note 1, *supra*.[8]

5. Finally, petitioner argues (Pet. 31-32) that this case would be an "excellent opportunity" (Pet. 31) for reconsidering *Feres* because she asserts SSgt. Witt was on leave when the alleged medical malpractice occurred. SSgt. Witt was, however, on active duty and engaged in the process of moving his family to California pursuant to military orders. See No. 2:08-cv-02024, Docket entry No. 12-1, ¶ 2. In any event, the courts of appeals have held that *Feres* bars FTCA medical malpractice claims even if the injured service member was on leave when the alleged malpractice occurred. See, *e.g.*, *Jimenez*, 158 F.3d at 1229; *Appelhans*, 877 F.2d at 311-312; *Lampitt* v. *United States*, 753 F.2d 702, 703 (8th Cir.) (per curiam), cert. denied, 472 U.S. 1029 (1985); *Jones* v. *United States*, 729 F.2d 326, 328-329 (5th Cir. 1984). Although petitioner suggests (Pet. 32) that a circuit conflict exists on whether *Feres* bars claims arising from malpractice occurring while a service member is on leave, the cases that petitioner cites actually concern "medical hold," a process used to retain service members beyond their previously established retirement or

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[8] Petitioner also contends (Pet. 29-30) that the frequency of *Feres* cases in the lower courts demonstrates a lack of clarity that warrants this Court's intervention. The petition, however, fails to show that *Feres* cases actually arise with unusual frequency, and resolution of medical malpractice suits such as this one requires the expenditure of only limited judicial resources. See pp. 8-9 & note 4, *supra*.

separation date for disability processing. See *Harvey* v. *United States*, 884 F.2d 857, 861 (5th Cir. 1989); *Madsen* v. *United States ex. rel. U.S. Army Corps of Eng'rs*, 841 F.2d 1011, 1012 (10th Cir. 1987). Any conflict between *Harvey* and *Madsen* is not implicated by this case, because SSgt. Witt was never on medical hold.[9]

Petitioner also argues (Pet. 31-32) that this case would be a good vehicle to reconsider *Feres* because medical malpractice claims purportedly do not require second-guessing of military judgments and thus do not implicate the rationales underlying *Feres*. As various courts of appeals have explained, however, the *Feres* rationales apply to medical malpractice claims by service members for several reasons. First, free medical care by the military is a benefit of military service and thus triggers the "distinctively federal" relationship between a soldier and the military. See, *e.g.*, *Del Rio*, 833 F.2d at 286; *Shults* v. *United States*, 421 F.2d 170, 171 (5th Cir. 1969); cf. *Costo*, 248 F.3d at 868 (applying same rationale to non-medical malpractice claims involving a benefit of service).[10] Medical malpractice suits by active-duty service members also could substantially disrupt the military mission, by requiring officers who may have since been assigned to serve in remote loca-

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[9] *Harvey* also suggests that a service member would also be able to sue for medical malpractice that occurred while he was on TDRL. 884 F.2d at 860. That issue also is not implicated by this case, because SSgt. Witt was not placed on TDRL until October 11, 2003, the day after the alleged malpractice occurred. See p. 2, *supra*.

[10] Free medical care is not only a benefit to the service member but also essential to maintaining a strong combat force. Maintaining medical readiness is as vital a command concern and as critical to military success as training, equipping, and deploying service members and planning logistics and combat.

tions to testify in court as to their decisions and actions, see *Del Rio*, 833 F.2d at 286; cf. *Stanley*, 483 U.S. at 682-683 (noting these concerns), and by requiring the military to reallocate scarce resources away from compelling military needs in order to avoid civil medical malpractice lawsuits for service-related injuries. See *Schoemer*, 59 F.3d at 30; *Bowers* v. *United States*, 904 F.2d 450, 452 (8th Cir. 1990). As noted above, all of the courts of appeals agree that *Feres* bars medical malpractice claims on behalf of active-duty service members. See pp. 8-9, *supra*. That consensus makes this case a particularly inappropriate vehicle for reexamining *Feres*'s scope.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
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ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Few cases still on the books have received as much opprobrium from judges and commentators as *Feres v. United States*. As the district court below opined, "now is the time to revisit the *Feres* doctrine." App. 7a.

The government is mistaken that reconsidering *Feres* "would particularly disserve the goal of maintaining a stable judicial system." Opp. 5. Twenty-five years is sufficient to conclude that *Johnson* did not settle the confusion *Feres* created. Calls among federal judges for this Court to reconsider *Feres* have grown more insistent since *Johnson*. *See* Pet. 21-22. Further extensions of this judge-made immunity rule merely engender disrespect for this Court.

The government does not contest that the petition raises important issues for service members. Nor does it identify any concern about this case as a vehicle for reconsidering *Feres*. Indeed, this case presents an opportunity to reexamine the *Feres* doctrine from broad or narrow perspectives. The Court can overrule *Feres* entirely, leaving the FTCA as Congress wrote the statute; it can overrule *Feres* as applied to medical malpractice cases, where the ostensible rationales for *Feres*'s "incident to service" test carry little weight; or it can overrule *Feres* as applied to service members injured by government negligence while on leave or who suffer wrongful death (so that a civilian is bringing suit), because the *Feres* rationales hold even less sway in those contexts. In this case, the government's negligence is straightforward; all that separates the Witt family from the recovery that Congress promised under the FTCA is continued fealty to the *Feres* judge-made immunity rule.

1. The government's principal argument against certiorari is *stare decisis*. Opp. 4-10. That argument goes more to the merits of whether *Feres* should be overruled in whole or in part than to whether this case presents an appropriate opportunity for this Court to evaluate the stability of *Feres* and *Johnson* as precedents worthy of continued adherence even though wrongly decided. Notably, the government nowhere urges *stare decisis* on the basis of any reliance interests. Nor could it. Unlike substantial reliance interests that have evolved in response to some statutory interpretations now understood to be erroneous, no such interests exist in this context. *Compare, e.g., Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (overruling a statutory interpretation on which public and private reliance has evolved "would dislodge settled rights and expectations or require an extensive legislative response"). The government merely obtains unjustified windfalls through immunity from suit for negligent acts that fall outside enumerated FTCA exceptions to liability.

Second, raising another argument that relates more to the merits than cert worthiness, the government observes (at 4-6) that Congress could alter *Feres*, but has not done so. While this Court has invoked that reason for statutory *stare decisis*, it runs headlong into a line of cases recognizing "the dangers of inferring congressional intent from legislative inaction." Gen. Tucker Amicus Br. 21-23 (collecting cases and authorities). Indeed, a significant separation-of-powers concern arises when the Court assumes that all statutory interpretations should be given *stare decisis* effect simply by congressional

inactivity. *See, e.g.*, *Johnson v. United States*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting).[1]

Third, the government urges (at 9-10) that this Court should be reluctant to upset *Feres* because lower courts have applied it in a few select areas, such as to Public Health Service ("PHS") officials and to foreign nationals serving in their own country's military service who are injured in joint military operations in the United States. But PHS officials are part of the "uniformed service," 42 U.S.C. § 201(p), so the same rules apply to PHS personnel as to active-duty military service members. And citation to a single court of appeals case decided nearly 30 years ago hardly supports the claim that an aspect of the law regarding tort recovery by foreign service members will be unsettled by this Court's reconsideration of *Feres*.[2]

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[1] The government's argument (at 7 n.2) that Congress has acted "based on the understanding that *Feres* governs" rests not on any statutory language, but rather on a House committee report, a source this Court has discounted for its dubious weight. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2006) (explaining problems with "judicial reliance on legislative materials like committee reports").

[2] *United States v. Stanley*, 483 U.S. 669 (1987), which the government also cites (at 9), is based on a rationale entirely distinct from *Feres*. Justice Scalia's opinion for the *Stanley* Court articulated a "policy judgment," 483 U.S. at 681, that a *Bivens* claim should not be inferred when it would entail "congressionally uninvited intrusion into military affairs by the judiciary," *id.* at 683. The opinion observed that the Court "might [feel] freer" to permit FTCA actions in the military context, because the FTCA contains "an explicit congressional authorization for judicial involvement that [is], on its face, unqualified." *Id.* at 681; *see also id.* at 682 n.5 (equating *Stanley* with Justice Scalia's dissent in *Johnson*).

Fourth, the government overlooks that the *Feres* Court judicially implied a substantive defense to a congressionally created right of action. Just as this Court no longer implies private rights of action, *see, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"), it should not be implying or extending substantive defenses to statutory causes of action, *see* Gen. Tucker Amicus Br. 18-21.

Fifth, unlike the malpractice cases decided with *Feres*, which involved acts of medical negligence to active-duty service members attached to units, this case further extends the *Feres* doctrine by denying recovery to a service member conceded to be on a three-month transfer between units.[3] As *Feres* itself acknowledged, in *Brooks v. United States*, 337 U.S. 49 (1949), this Court upheld FTCA liability against the government when "Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission." 340 U.S. at 146. SSgt Witt's status was functionally indistinguishable from Brooks's when he was injured. This case therefore involves a tension between two of this Court's precedents, which only this Court can resolve.

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[3] The complaint's allegations, which must be accepted as true at this stage of the litigation, assert that "Dean Witt was not scheduled to report to his commander for his new assignment until October 30, 2003 and had no official military duties at any time relevant to this claim." Compl. ¶ 6.3. Although not alleged in the complaint, counsel understands that SSgt. Witt also was on personal leave for the birth of his son at the time of his injury.

Finally, the government's argument (at 8-9 & n.4) that the law is especially well settled in the malpractice context is unpersuasive. The "evidence" the government marshals instead highlights why *Feres* should be reconsidered. The fact that civilians, including service members' dependents, recover for identical acts of malpractice heightens the irrationality of applying *Feres* in this context, as the lower courts recognize. Since *Johnson*, they have continued to urge this Court to reconsider *Feres* (*see* Pet. 21-22), a point the government ignores. The notion that *Feres* offers a "straightforward rule of decision" (Opp. 7) is especially unpersuasive in light of the lower courts' struggles to apply the doctrine in differing circumstances. *See* Pet. 6-18.

2. The government denies the existence of confusion in the lower courts by asserting that "the fundamental inquiry is whether the service member's injury arose out of activity 'incident to service.'" Opp. 10. That assertion evades the problem. "Incident to service" is nowhere defined in the FTCA *because that phrase does not appear in the FTCA*. Whenever courts invent rules and standards that Congress neither sanctioned nor defined, judges invariably introduce their own policy predilections. That is why the government's confidence in the "fact-specific approach" (Opp. 10) is so misplaced. The *Feres* doctrine spawns such controversy because "incident to service" has no natural meaning and a "fact-specific approach" offers no guidance to litigants or courts. The government's examples (Opp. 11) of lower-court divisions over "the service member's duty status at the time he or she was injured" (*id.*), "the activity in which the service member was involved" (*id.*), "whether the service member's conduct was

subject to military regulations" (*id.*), and "whether the service member's activity arose out of military life or was a benefit of military service" (*id.*) prove *our* point: those divisions have arisen from the original mistake of *Feres* to engraft an "incident to service" defense that Congress did not enact. Rather than denying this petition and exacerbating the harm of *Feres* through further judicial rule-making, the Court should reconsider the propriety of the entire exercise that *Feres* unleashed.

That conclusion follows from the government's tortured attempts to deny the conflicts on a range of issues that flow from *Feres*'s "incident to service" test. The government concedes that a service member's child can recover when receiving negligent treatment directly (Opp. 13), even though she was treated in a military medical facility as an "incident to" her parent's military service. Likewise, no rational basis exists for giving a service member a right to recovery when a child is treated negligently, while denying recovery when the service member is the recipient of negligent care. *See* Pet. 11-14 (collecting cases). All the proffered concerns (questioning military authority, unit discipline, testimony of faraway doctors) arise when service members sue for medical malpractice on behalf of injured family members.

The government's attempt (at 13-14) to reconcile the recreational-injury cases also supports granting certiorari. As a corollary to a made-up "incident to service" test, the government rationalizes one line of cases as reflecting a "military function" sub-test. Under *Regan v. Starcraft Marine LLC*, 524 F.3d 627 (5th Cir. 2008), for example, the government faces liability for injury to a service member who is on

a boat rented by another service member from a military recreational facility. Because the military recreational facility permitted civilians to be guests on the boats rented by military personnel, the government explains (at 14) that the injured service member was not performing a "military function" in that case. Yet in *Costo v. United States*, 248 F.3d 863 (9th Cir. 2001), and *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986), the injured service member enjoying recreation was barred under *Feres* because the activities were "under military control." Opp. 14. Evidently, the "military recreational facility" at issue in *Regan* is somehow not "under military control" even though it is a "military recreational facility." *Id.* The tortured quality to the government's effort to reconcile the cases merely highlights why this Court should either clarify further the elusive meaning of "incident to service" or do away with the test.

The government offers no realistic way to resolve the issues raised by *Feres*-created inconsistency. In *Johnson*, the dissent noted that the petitioner had not asked for *Feres* to be overruled. Because petitioner here preserved from the outset of the litigation the question whether *Feres* should be reconsidered, this case presents an appropriate opportunity for this Court to do so.

3. The government's arguments that *Feres* was "correctly decided" (Opp. 16) ring hollow. It invokes the same post-*Feres* modified rationales discussed in *Johnson* and rebutted comprehensively by the *Johnson* dissenters. First, the government asserts that it is illogical to make the situs of the negligence affect the "liability of the Government to [the] serviceman." *Id.* (quoting *Johnson*, 481 U.S. at 689). Yet Congress already found the logic in that rule when it linked

the choice of law under the FTCA to "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *cf. id.* § 2680(k) (expressly excepting from FTCA liability "[a]ny claim arising in a foreign country"). Moreover, the same considerations apply to injuries to civilians (including dependents) and to military members not injured "incident to service." *See, e.g., Johnson*, 481 U.S. at 696. The government asserts that a distinction drawn between permitting FTCA claims for domestic acts of negligence while precluding foreign-sited negligence would create "morale" problems (Opp. 17), but Congress specifically decided otherwise. And, whereas a service member might at least appreciate the logic of foreclosing *all* liability for foreign-sited negligence to civilians and military personnel alike, no justification attaches to the conceded court holdings that extend FTCA remedies to *civilians* for domestically based military negligence, while foreclosing service members from those same remedies for the same negligence.

Second, the government invokes the justification, thoroughly rebutted by the *Johnson* dissenters (481 U.S. at 697-98), that service members supposedly receive benefits that "compare extremely favorably" to workers' compensation schemes. Opp. 17. But it ignores *amici*'s demonstration that those benefits do not justify the *Feres* bar, particularly in light of the current state of the Veterans Administration. *See* Veterans Legal Support Center Amicus Br. 7-23.

Third, the government asserts that the supposed intrusion of the judiciary into "sensitive military affairs" (Opp. 18) justifies the *Feres* doctrine. Those arguments prove too little and too much. They prove too little because that same supposed intrusion will occur in cases involving military negligence commit-

ted against civilians, which the judiciary has long recognized that it can decide. *See* Pet. 27. And it proves too much, because medical malpractice claims, in particular, do not intrude on sensitive military affairs at all.

Finally, the government offers the textual argument that the FTCA applies "in the same manner and to the same extent as a private individual under like circumstances." Opp. 19 (quoting *Feres*, 340 U.S. at 141 (quoting 28 U.S.C. § 2674)). That is, in effect, a claim grounded not in the FTCA's exemptions, but in its broad *waiver* of sovereign immunity. As the *Johnson* dissent explained, however, this Court abandoned that mode of interpreting the FTCA – that government liability always requires the existence of "parallel private liability" – more than 50 years ago. *See* 481 U.S. at 694-95 (citing *Rayonier Inc. v. United States*, 352 U.S. 315, 319 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955)). And, in prior briefs to this Court defending *Feres*, the government has not sought to disinter that mode of analysis. Instead, implicitly conceding that the *Feres* doctrine has no textual basis, the government grounded the doctrine solely in the policy rationales of *Feres* and *Johnson*.[4] The government's attempt now to resurrect a long-rejected mode of statutory interpretation undermines its claim for fealty to statutory *stare decisis*: a reason for overturning a prior decision of this Court is a rejection of an interpretation's underpinnings. *See Neal v.*

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[4] *See, e.g.*, Resp. Br. 9-10, *Matthew v. Department of the Army*, No. 08-1461 (U.S. filed Aug. 7, 2009); U.S. Br. 9, *Costo v. United States*, No. 01-526 (U.S. filed Nov. 26, 2001); U.S. Br. 8-11, *Sonnenberg v. United States*, No. 90-539 (U.S. filed Dec. 24, 1990).

United States, 516 U.S. 284, 295 (1996). Moreover, although certain FTCA exceptions overlap with others – a discretionary function, of course, can occur in a foreign land as well as during war – petitioner's argument is not that the FTCA must be construed to achieve analytical separation between exceptions. *But see* Opp. 19-20. Rather, when none of the enumerated exceptions applies, the FTCA permits an action against the government.

4. The government incorrectly maintains (at 20) that this Court simply should ignore judges' repeated criticisms of the *Feres* doctrine. It does not deny that *Feres* – perhaps more than any other holding of this Court that has not yet been overruled – has been the subject of numerous and repeated calls by lower-court judges for this Court's reconsideration. Most have come after *Johnson*, confirming that *Johnson*'s reaffirmation of *Feres* did not settle the matter once and for all. *See* Pet. 21-22. The government's acknowledgment that companion cases to *Feres* involved medical malpractice claims *supports* granting this case to reconsider the doctrine, because it enables the Court to evaluate whether the justifications thought to be appropriate in 1950 for a judicially crafted substantive defense to the FTCA are still persuasive.

5. The government erroneously contends that SSgt. Witt's leave status provides no basis for reconsidering *Feres*. Not only was SSgt. Witt between units on military-ordered transfer status, but he was on official personal leave from duty the day he was injured (October 10, 2003). The government suggests there are cognizable differences for FTCA liability between "leave," "active duty" transfer status, and "medical hold" (Opp. 21-22), but those arguments

merely highlight the difficulties of administering the ambiguous "incident to service" test. FTCA liability should not rest on such fine and judicially created distinctions, and SSgt. Witt's family should not be denied FTCA remedies because he was on "leave" rather than "medical hold" when he fell victim to medical malpractice. *See, e.g., Parker v. United States*, 611 F.2d 1007, 1013-14 (5th Cir. 1990) (*Feres* not applicable to active-duty service members on 4-5 day pass).

The government also seeks to justify including medical malpractice within the *Feres* ambit (Opp. 22-23), but the doctrine's ostensible rationales are simply inadequate for malpractice claims. First, it is a misnomer to describe the medical care that service members receive as "free" (Opp. 22-23), because as an economic matter service members accept reduced wages for those benefits. Moreover, the difficulties of travel for doctors and other personnel who commit medical malpractice (Opp. 23) are certainly less significant than they were 60 years ago, particularly given technological advances in video-conferencing and air travel. To the extent those rationales apply at all in domestic situations, they apply to civilian and military personnel alike, yet *Feres* bars only the latter from recoveries that the former can obtain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice ("AAJ") respectfully submits this brief as *amicus curiae*.[2] AAJ is a voluntary national bar association whose members represent plaintiffs in civil actions. AAJ has participated as *amicus curiae* before this Court in dozens of cases of importance to AAJ members and to the public. AAJ members routinely represent large numbers of persons in personal injury actions and represent members of the military in a wide range of actions.

REASONS FOR GRANTING THE WRIT

A service member is about as likely to die from medical malpractice in a military hospital as from enemy action on the battlefield in Afghanistan.[3]

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] All counsel of record were notified of *amici*'s intent to file an *amicus* brief pursuant to Rule 37. The parties have supplied letters consenting to the filing of this brief. Those letters are submitted with this brief.

[3] *To Err is Human*, the Institute of Medicine's landmark study of medical errors, calculated that between 44,000 and 98,000 thousand deaths per year result from medical malpractice, based on 33.6 million hospital admissions, or a rate of 1.3 to 2.9 per thousand. Institute of Medicine, *To Err is Human: Building a Safer Health System* 1 (Linda T. Kohn, Janet M. Corrigan & Molla S. Donaldson, eds., 2000), http://books.nap.edu/openbook.php?record_id=9728. In 2009, 59,714 service members were admitted to military hospitals (86,542 total service-member admissions minus 31 percent, or 26,828, who were admitted to non-military hospitals where, invoking a conservative assumption, the *Feres* doctrine would

Death in battle is a risk service members shoulder, and their families understand there is no remedy for its realization. Death by malpractice, in a setting wholly analogous to civilian life, is a less obvious risk, and the absence of a remedy can be a bitter revelation and an unexpected burden. This Court created that burden, and this Court should lift it, vesting modern military families with the same rights other Americans enjoy.

The modern military is vastly different from the military that shaped the thinking of the 1950

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not apply). *Hospitalizations Among Members of the Active Component, U.S. Armed Forces*, 2009, Medical Surveillance Monthly Report (MSMR), Vol 17, No. 4 (Armed Forces Health Surveillance Center), Apr 2010, at 2-5, http://www.afhsc.mil/viewMSMR?file=2010/v17_n04.pdf#Page=03. (MSMR is "the publication of record of the Armed Forces Health Surveillance Center (AFHSC) regarding the incidence, impact, distribution, and trends of illnesses and injuries among all Reserve and active component members of the Army, Navy, Air Force, Marine Corps, and Coast Guard" *Id.* at 2). Applying the rates in the IOM study, which included military hospitals, yields from 78 to 174 deaths per year. Battlefield fatalities for U.S. forces in Afghanistan have averaged 145 per year over the last ten years, with the raw numbers as follows: 2001, 12; 2002, 49; 2003, 48; 2004, 52; 2005, 99; 2006, 98; 2007, 117; 2008, 155; 2009, 317; 2010, 499 Operation Iraqi Freedon and Operation Enduring Freedom, *Afghanistan Coalition Military Fatalities By Year*, http://icasualties.org (last visited Feb. 7, 2011). The figure for deaths by malpractice should be conservative, as there is reason to believe malpractice rates are higher in the military system than in the hospital system as a whole. *See* Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 57, 57-67 (2003) (because of *Feres*, "Medical malpractice is generally viewed as rampant in the military, which has been widely criticized for failing to adopt standards and systems that are common to the civilian sector.")

Feres[4] court. During World War II, "about 12 percent of the population" served in the military, including, remarkably, "56 percent of the men eligible for military service." David R. Segal & Mady Wechsler Segal, *America's Military Population*, 59 Population Bulletin, no. 4, Dec. 2004 at 4. When *Feres* was decided, President Truman had just ordered desegregation of the military, an order the military was still resisting. Charles C. Moskos & John Sibley Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* 30-31 (1996). Warfare was different, requiring more troops than are required for modern warfare, with the military relying on conscription to meet its needs. Segal & Segal, *supra*, at 3.

Today's volunteer military is smaller, the proportion of the population serving trimmed to about 0.5 percent. *Id.* at 5, Figure 1. It is different in kind. "The all-volunteer military is more educated, more married, more female, and less white than the draft-era military." *Id.* at 3. In fact, it is "one of the most integrated institutions in America." Br. for Amici Curiae Julius W. Becton, Jr., *et al.* at 13, *Grutter v. Bollinger* 539 U.S. 306, 331 (2003) (No. 02-241), *cited with approval in Grutter v. Bollinger*. Service members are "highly educated" and more likely to come from high-income neighborhoods than from low-income neighborhoods. Shanea Watkins & James Sherk, *Who Serves in the U.S. Military? The Demographics of Enlisted Troops and Officers*, Heritage Foundation Center for Data Analysis Report #08-05 (Aug. 2008), http://www.heritage.org/research/reports/2008/08/who-serves-in-the-us-

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[4] *Feres v. United States*, 340 U.S. 135 (1950)

military-the-demographics-of-enlisted-troops-and-officers. This "new generation of military recruits has aspirations and expectations for quality of life services and access to health care, education, and living conditions that are consistent with the American standard of living." Donald H. Rumsfeld, *The Annual Defense Report: 2004 Report to the President and to the Congress* 19 (Cosimo ed., 2005). Fulfilling their aspirations is necessary to assure our "continued readiness to fight and win the Nation's wars." Dep't of Defense, *Modernized Social Compact: Report of the First Quadrennial Quality of Life Review* ii (2004), http://militaryhomefront.dod.mil/mhf_reports/QQoLR/QQoLR-9Of13.pdf

Today's military focuses not just on these service members, but on the families they bring with them. Today 1.2 million active duty service members come with 700,000 spouses and 1.2 million children. Segal & Segal, *supra*, at 2. Their spouses work: "Like their civilian counterparts, most of today's military families rely on two incomes." *Modernized Social Compact*, at i. This new demographic situation led President George W. Bush in 2001 to issue a National Security Directive creating a "new social compact" between the Department of Defense and military families, recognizing that attention to families, not just individuals, was needed to meet the recruitment and retention needs of the services. Dep't of Defense, *A New Social Compact: A Reciprocal Partnership Between the Department of Defense, Service Members and Families* 2-3 (2002), http://www.militaryhomefront.dod.mil/portal/page/mhf/MHF/MHF_DETAIL_1?content_id=168190. The President's directive required DOD to reconfigure its support services appropriately. *Id.*

A new demographic reality has caused the social compact that underlay the thinking of *Feres* to be replaced, strongly suggesting that *Feres* should be revisited and re-tuned to match modern conditions. *See* Benjamin Nathan Cardozo, *The Growth of the Law* 136-37 (1924) ("A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience.") Like the order of battle rule created by this Court in *Saucier v. Katz*, 533 U.S. 194 (2001), and abandoned by it in *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 816 (2009), the *Feres* doctrine is "a judge-made rule . . . , and experience has pointed up [its] shortcomings."[5] Like the rule in *Pearson*, changing it does not "implicate 'the general presumption that legislative changes should be left to Congress,'" and "change should come from this Court, not Congress." *Id.* at 816-17.

Two legal matters of constitutional magnitude also counsel reconsidering the *Feres* doctrine. The doctrine deprives service members, for no rational reason, of remedies available to citizens in general and even to similarly situated employees of the United States.[6] It incurs on the constitutional rights

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[5] *See United States v. Johnson*, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting) (*Feres* doctrine was created by Court, not Congress). As an example of shortcomings *see, e.g.*, Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 Mil. L. Rev 1, 4 (2007) ("The *Feres* doctrine . . . is too broad in scope and goes beyond protecting military decision making and discipline."); Jonathan Turley, *Pax Militaris*, *supra* n. 3.

[6] *See* Turley, *Pax Militaris*, *supra* n. 3.

of service members and their families to seek justice in the courts and to be afforded equal protection of the laws. Its broad sweep serves no function important enough to render these incursions tolerable.

The *Feres* gloss on the Federal Tort Claims Act (FTCA) is not consistent with modern notions about the importance of remedies or about the extent of sovereign immunity. This Court early recognized that providing remedies for civil harms is "[o]ne of the first duties of government," *Marbury v. Madison*, 5 U.S. 137, 163 (1803) and in 1983 made crystal clear that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983). This Court noted in *Feres* that sovereign immunity was in tension with that right, *Feres*, 340 U.S. 139-40, but nonetheless allowed fewer persons than Congress intended through the courthouse door. Three years later the Court recognized a trend against sovereign immunity, hailing the FTCA as "another example of the progressive relaxation by legislative enactments of the rigor of the immunity rule." *Dalehite v. United States*, 346 U.S. 15, 30 (1953). That relaxation has accelerated. Since 1946, numerous states have further abrogated sovereign immunity legislatively. *See* Restatement (Second) of Torts § 895B (1979) (Reporter's Note listing positions of all states). More significantly, at least 16 states have abrogated sovereign immunity judicially. Shawn A. Grinolds, *Sovereign Immunity—Judicial Abrogation of North Dakota's Sovereign Immunity Results In Its Possible Legislative Reassertion and Legislation to Provide Injured Parties a Remedy for the Torts Committed by the State or Its Agents*

Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632 (N.D. 1994), 71 N.D. L. Rev. 761, 779, nn. 107-08 (collecting decisions) (1995). Those state decisions further suggest that this Court need not wait for legislative action to reconsider its judicial extension of sovereign immunity.

Reconsideration is compelled, too, by constitutional doctrine that has evolved to protect the family unit, the unit now recognized as critical to the success of the military. Since *Feres* was decided, this Court has decided that the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), and the right to privacy within marriage, *Griswold v. Connecticut*, 381 U.S. 479 (1965), are fundamental. It has evolved doctrine that forbids governmental infringement of such rights "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). *Feres* discriminates against service members and their families, depriving them of remedies secured to similarly situated civilians, *see* Turley, *Pax Militaris*, *supra* n. 3, and burdens their familial relations. It creates distinctions that cannot be viewed even as rational, much less narrowly tailored: if Alexis Witt had died under the same circumstances as Dean Witt did die, Dean Witt, as representative of her estate, could pursue the exact claim that *Feres* denies here. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 201, 203 (2d Cir. 1987).

Military families deserve to have this Court reappraise its ruling in *Feres*, looking at new facts through the lens of new law.

CONCLUSION

The Petition for a Writ of Certiorari should be **GRANTED**.

February 9, 2011

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INTEREST OF *AMICI CURIAE*[1]

Kori Cioca, and her fellow plaintiffs in *Cioca v. Rumsfeld*,[2] are veteran and active-duty servicemen and servicewomen who, while serving in the United States Army, Navy, Marine Corps, Coast Guard, or Reserves, have been raped or otherwise sexually assaulted by active duty members of the military. Pursuant to this Court's decisions in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971) and *Davis v. Passman*, 422 U.S. 228 (1979), they have brought suit in a federal district court against Secretaries of Defense Rumsfeld and Gates, alleging that the Secretaries violated their constitutional rights by failing to take reasonable measures to reduce and prosecute instances of sexual assault and rape in the military.

This Court's discussion of *Chappell v. Wallace*, 462 U.S. 296 (1983), has caused some lower courts to believe the *Feres* doctrine serves to preclude *all*

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[1] No counsel for any party to this action authored any part of this brief, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. *See* SUP. CT. R. 37.6. Counsel of record for both parties were notified of *amici*'s intent to file this *amicus* brief pursuant to Rule 37. The parties have supplied letters consenting to the filing of this brief. Those letters are submitted with this brief.

[2] United States District Court, Eastern District of Virginia; Case No. 11CV151.

constitutional claims brought by our Nation's active-duty military servicemen and servicewomen. Consequently, because the *Cioca* Plaintiffs were active-duty servicemen and servicewomen when the Government violated their constitutional rights, they have a sincere interest in advocating for the elimination of the *Feres* doctrine.

The *Cioca* Plaintiffs respectfully submit this brief as *amici curiae*. The *Cioca* Plaintiffs believe the *Feres* doctrine should not stand. The consistent misapplication of that doctrine has resulted in numerous instances of servicemembers losing their right to seek judicial relief for the constitutional rights violations they suffer while serving their country.

SUMMARY OF THE ARGUMENT

In 1946, Congress passed the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"), which waived the United States' sovereign immunity for suits sounding in tort "under circumstances where the United States, if a private person, would be liable" to the claimant. In creating the FTCA, Congress explicitly drafted several statutory exceptions. None of the statutory exceptions exempts the military from the FTCA's waiver of sovereign immunity. In 1950, however, the Court looked beyond the plain text of the FTCA and created the *Feres* doctrine, a judicially crafted exception that bars claims by military servicepersons for injuries that arise out of or

are in "the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950).

Since many other *amicus* briefs have thoroughly discussed the absence of legislative history or statutory text to support the *Feres* doctrine's judicial creation, the *Cioca* Plaintiffs will not discuss those issues. Instead, the *Cioca* Plaintiffs draw the Court's attention to the manner in which the *Feres* doctrine, combined with this Court's decision in *Chappell v. Wallace*, 462 U.S. 296, 300 (1983), has misled lower courts into depriving servicemembers of their constitutional rights.

In *Chappell*, decided thirty-three years after the Court first introduced the *Feres* doctrine, the Court held that the *Feres* doctrine should "guide" lower courts in adjudicating the constitutional claims of military servicemen and servicewomen brought under *Bivens*. *See Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (reasoning that although the circumstances in *Chappell* concerned only "limitations on the type of *nonstatutory* damage remedy recognized in *Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* [still] guides our analysis in this case.") (emphasis added). The Court subsequently explained in *Stanley v. United States*, 483 U.S. 669, 681 (1987) that it saw "no reason why [the Court's] judgment in the *Bivens* context should be any less protective of military concerns that it has been with respect to FTCA suits, where we adopted [the *Feres*] 'incident to service' rule." In *Stanley*, the Court merged the *Feres* doctrine

into the "special factors counseling hesitation" test in *Bivens*, affirming "the reasoning of *Chappell* that 'the special factors counseling hesitation' . . . require abstention in the inferring of *Bivens* actions as extensive as the exception to the FTCA established by *Feres* and *United States v. Johnson*." *Id.* at 683-84.

At present, many lower courts faced with a constitutional claim from service members inquire as to whether the constitutional claim arose "incident to service."[3] This is troublesome because it inappropriately limits lower courts' inquiry to whether a violation of a serviceman or servicewoman's constitutional rights occurred "incident to service." It is certainly one thing for a court to consider whether a *tort* occurred incident to service for purposes of the FTCA, but the adjudication of a *constitutional right violation* demands a higher degree of judicial consideration than the *Feres* doctrine "incident to service" analysis.

Constitutional right violations that invade bodily integrity, such as rape and sexual assault, should never be considered merely "incident to service."

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[3] *See, e.g., Brown v. United States*, 739 F.2d 362, 363 (8th Cir. 1984) (considering whether the *Feres* doctrine barred the plaintiff's constitutional claim based on a determination of whether the "injury was incident to his military service."); *see also*, *Morse v. West*, 975 F.Supp. 1379, 1381-82 (D.Colo. 1997) (finding "that the alleged incidents of harassment were incident to military service[, and consequently,] . . . barred because the military enjoys an immunity to *Bivens* claims that is coextensive with its *Feres* immunity.") (internal quotation marks and citations omitted).

Granting the Government unquestioned immunity for constitutional rights violations based on the *Feres* doctrine is wrong. Such analysis fails to consider the ramifications of absolving the military to any liability for constitutional rights violations. Any such immunity should only be the product of a doctrine that fully contemplates the balance of the constitutional rights at stake with an underlying policy rationale for granting the Government immunity. The *Feres* doctrine is not such a doctrine. Thus, this Court should reconsider and overturn the *Feres* doctrine.

ARGUMENT

Nothing in the *Feres* doctrine reflects the correct consideration a court must undertake in evaluating a *Bivens* constitutional claim. The *Feres* doctrine was not designed to adequately address the important issues raised when a serviceman or servicewoman presents a claim that his or her constitutional rights have been violated. Dismissing our military men and women's constitutional right claims pursuant to a cursory *Feres* "incident to service" inquiry violates the very democratic ideals and notions of liberty that our military fights to preserve.

I. The *Feres* Doctrine Should Not Bar Constitutional Claims

The underlying rationales for the *Feres* doctrine serve no rational purpose in a court's evaluation of a

serviceman or servicewoman's constitutional *Bivens* claim. That is, the "three broad rationales underlying the *Feres* decision" are in no way implicated by a court's consideration of the Government's liability for a constitutional rights violation. *See United States v. Johnson*, 481 U.S. 681, 688-89 (1987).

In *Johnson*, the Court once again affirmed its reliance on FTCA text and legislative history for its creation of the *Feres* exception, and the Court listed three policy justifications for its judicially created exception to the statute: the concept that "the relationship between the Government and members of its armed forces is 'distinctively federal in character' "; "the existence of . . . generous statutory disability and death benefits" for injured military personnel; and finally, the idea that the *Feres* exception precludes the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Johnson*, 481 U.S. at 688-91.

None of the three aforementioned *Feres* rationales justifies barring the review of constitutional claims of our Nation's servicemen and servicewomen brought under *Bivens*.

A. Distinctively Federal in Character

In articulating the first underlying rationale for the *Feres* doctrine, the *Feres* Court described the relationship between the Government and the members

of its armed forces as "distinctively federal in character." *Feres*, 340 U.S. at 143. Consequently, the Court's first justification for its creation of the *Feres* exception doctrine was predicated on an overview of a statutory scheme that incorporated divergent state laws and juxtaposed them on a particular entity – the military – that is purely federal in character.

In creating the *Feres* doctrine, the *Feres* Court recognized that the FTCA "assimilates into federal law the rules of substantive law of the several states, among which divergencies are notorious." *Feres*, 340 U.S. at 143. Because "a soldier on active duty has no such choice and must serve any place or, under modern conditions, any number of places in quick succession in the forty-eight states, the Canal Zone, or Alaska, or Hawaii, or any other territory of the United States[,]" the Court reasoned that "[i]t would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." *Id.* Thus, the *Feres* Court described the relationship between the Government and the members of its armed forces as "distinctively federal in character," based on a finding that "Congress could not have intended that local tort law govern the 'distinctively federal' relationship between the Government and enlisted personnel." *Johnson*, 481 U.S. at 694 (quoting *Feres*, 340 U.S. at 142-44).

Whether the relationship between the Government and its military can be described as "distinctively federal in character," however, has absolutely no bearing on a court's consideration of a constitutional *Bivens* claim. In stark contrast to the tort claims that arise under the FTCA, constitutional claims brought pursuant to *Bivens* can only arise from one source: the federal Constitution. There are no imaginable scenarios in which a constitutional *Bivens* claim brought by a military servicewoman or serviceman could change substantively based on where the constitutional right violation occurred. Consequently, what the *Johnson* Court articulated as the concern "that local tort law [might] govern the distinctively federal relationship between the Government and enlisted personnel" is not at play when courts consider a constitutional rights violation brought pursuant to *Bivens*.

Therefore, the first rationale underlying the creation of the *Feres* doctrine lends no support to the doctrine's recent migration into *Bivens*.

B. The Existence of an Alternative Recovery Scheme

Likewise, "[t]he second factor discussed in *Feres*, the presence of an alternative military compensation system, is no less nebulous than the first." *Hunt v. United States*, 636 F.2d 580, 598 (D.C. Cir. 1980). In *Johnson*, the Court explained that "the existence of these generous statutory disability and death benefits

[in the Veterans' Benefits Act] is an independent reason why the *Feres* doctrine bars suit for service-related injuries." *Johnson*, 481 U.S. at 689.

The existence of a compensation scheme outside of the FTCA, however, is in no way pertinent to a court's consideration of a *Bivens* claim. Nothing in the Veterans' Benefits Act provides compensation for constitutional rights violations. The fact that the Veterans' Benefits Act provides "generous statutory disability and death benefits" for injured military service personnel provides no reason or rationale to conclude that these servicemen and servicewomen should be barred from suing to vindicate violations of their constitutional rights.

C. Military Discipline and Effectiveness

Third, and finally, "*Feres* and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the types of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Johnson*, 481 U.S. at 690 (internal quotation marks and brackets omitted). Accordingly, lower courts have interpreted the third *Feres* rationale as prohibiting the courts from "delving into military matters and calling to bar military decisions and institutions." *Durant v. Neneman*, 884 F.2d 1350, 1352 (10th Cir. 1989). Or as the Eighth Circuit has labeled it, the

third rationale is predicated on "the fear of disrupting the military disciplinary structure." *Brown v. United States*, 739 F.2d 362, 365 (8th Cir. 1984).

This rationale, however, is not implicated in the context of *Bivens*, where military personnel sue for constitutional rights violations only. As the Court explained in *Brown*, it was the fear of "the extreme results that might obtain if suits under the Tort Claims Act were allowed for *negligent* orders given or *negligent* acts committed in the course of military duty [that] led the Court to read that Act as excluding claims of that character." *United States v. Brown*, 348 U.S. 110, 112 (1954) (emphasis added). Because *Bivens* claims arise out of constitutional violations and *not* mere acts of negligence that occur in the line of duty, there is less of a threat that a judicial inquiry into the *constitutional* injury will thwart military discipline and readiness. As opposed to ordinary orders or acts committed in the course of military duty, no military officer has the discretion to violate the constitutional rights of servicemembers. Consequently, judicial inquiry into constitutional rights violations occurring in the military can never intrude on a matter that is purely within the "military decisions and institutions."

Permitting egregious constitutional rights violations to continue unchecked drastically undermines the military's discipline and readiness. In 2009, the Department of Defense admitted that repeated rape and sexual assaults were undermining the

effectiveness and integrity of the entire military, noting:

> In the armed forces sexual assaults not only degrades individual resilience but also erodes unit integrity. Service members risk their lives for each other to keep fellow service members out of harm's way. Sexual assault breaks this important bond and tears apart military units. An effective fighting force cannot tolerate sexual assault within its ranks. Sexual assault is incompatible with military culture, and the costs and consequences for mission accomplishments are unbearable.

2009 *Annual Report on Sexual Assaults in the Military*.

Thus, in the context of sexual assault in the military, it is clear that application of the *Feres* doctrine does nothing to improve the readiness and effectiveness of our military. Instead, the lower courts' application of *Feres* to bar *Bivens* claims for constitutional rights violations resulting from rape and sexual assault has only served to perpetuate the ring of silence surrounding one of the gravest threats to the integrity of our military as a whole. *See also, Smith v. United States*, 196 F.3d 774, 778 (7th Cir. 1999) ("Sexual assault and sexual harassment is always demeaning and often permanently scars the victim. . . . Tolerance of such behavior [in the military] also results in a warping of military discipline, a

lack of military readiness, and a weakening of national security.").

Accordingly, this Court should overturn the *Feres* doctrine, or at the very least make clear that the doctrine does not bar the constitutional *Bivens* claims of our Nation's military personnel.

II. Constitutional Rights Violations Are Never "Incident To Service"

In contrast to claims sounding in tort, "constitutional claims are serious ones, involving the alleged deprivation of [a person's] fundamental rights." *Saum v. Widnall*, 912 F.Supp. 1384, 1396 (D.Colo. 1996). A constitutional right violation is never simply a question of something that occurs "incident to service." Consequently, "[t]he potential injury[,] if review is refused[,] clearly outweighs any interference with military functions if review is granted." *Id.* In this regard, it is clear that the *Feres* doctrine, which was designed to adjudicate the Government's immunity concerning claims sounding in tort, is ill-equipped to consider the magnitude of some constitutional rights violations. The *Feres* doctrine lacks the necessary framework to reach a proper determination of whether a *constitutional* claim should be allowed to proceed past an initial jurisdictional determination.

The *Feres* framework is woefully inadequate for the task of remedying a constitutional right violation. Although the *Feres* doctrine was never designed to enable a court to consider granting governmental

immunity over constitutional claims, following the Court's decision in *Chappell*, lower courts now must struggle to analyze the constitutional rights of our military personnel within the *Feres* framework. Particularly problematic is that the *Feres* framework collapses what would otherwise constitute a constitutional right inquiry into one simple inquiry: whether the injury occurred "incident to service." *Feres*, 340 U.S. at 146. As a result, the application of the *Feres* doctrine to bar constitutional *Bivens* claims has – not surprisingly – caused our lower courts to reach some absurd and conflicting results.

The *Feres* doctrine has been inappropriately used to preclude a number of constitutional rights claims brought by our military personnel on the basis that the constitutional violations they suffered occurred "incident" to their "service." *See, e.g., Brown v. United States*, 739 F.2d 362, 363, 365 (8th Cir. 1984) (applying the *Feres* doctrine to bar constitutional rights claims arising out of a "mock lynching" that occurred while the plaintiff was "participating in National Guard training exercises" since, the court reasoned, "the *Feres* doctrine applied to bar a claim brought directly under the Constitution pursuant to *Bivens*.") (internal citations omitted); *Bartley v. U.S. Dept. of Army*, 221 F.Supp.2d 934, 937, 948 (C.D.Ill. 2002) (applying the Seventh Circuit's "in the course of activity incident to military service" *Feres* framework to dismiss the plaintiffs' claims that their constitutional rights were violated as a result of "continuing harassment and retaliation, including rape, sodomy,

unwelcome sexual advances and touching, requests for sexual favors, sexual innuendos, harassing phone calls, threats of physical harm, non-consensual sex and duress" in the hands of their military superiors); *Morse v. West*, 975 F.Supp. 1379, 1381 (D.Colo. 1997) (noting that since in "*Feres*, the Supreme Court held 'that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service[,]' . . . . the [plaintiff's] claims asserting violations of the Constitution pursuant to *Bivens* are . . . barred because the military enjoys an immunity to *Bivens* claims that is coextensive with its *Feres* immunity.") (internal citations and quotation marks omitted).

Other courts reviewing comparable claims found the *Feres* doctrine did not bar the constitutional claims of military personnel properly. *See, e.g., Saum v. Widnall*, 912 F.Supp. 1384, 1396 (D.Colo. 1996) (concluding that plaintiff's "claims that defendants targeted her for sexual harassment in violation of her constitutional rights . . . *are reviewable*. . . .") (emphasis added). In declining to apply the *Feres* framework to dismiss the plaintiff's claims, the district court in *Saum* reasoned that "[t]he deference due the Air Force in matters of training does not bar claims that, in this particular instance, defendants violated the rules and regulations governing such training or [the plaintiff's] constitutional rights. [The plaintiff's] claims tread on an area of expertise long conceded to

the courts. They are not so weak that review in this case would be futile." *Id.*

The *Feres* doctrine's overly-simplified "incident to service" inquiry should not be grounds to dismiss the constitutional claims of our military servicemen and servicewomen. Dismissing their constitutional claims based on a determination that the sexual assault or rape they suffered came about as a mere "incident to service" is nothing less than a betrayal of the men and women who risk their lives to protect our Nation and its democratic ideals. *See Gonzalez v. United States Air Force*, 88 Fed.Appx. 371, 379 (10th Cir. 2004) (Lucero, J., concurring) ("[N]o one should suggest that when young Americans sign up for military service, they can expect that potential sexual assaults upon them will be routinely considered 'incident' to that service.").

There is no legal basis on which to conclude military personnel should be singled out as a class of people who lack any remedies to prevent constitutional claims violations, yet the Court's *Feres* doctrine has led to that unjust result. The Court owes it to the men and women who sacrifice their lives for their country to overturn the *Feres* doctrine.

CONCLUSION

For the reasons set forth in this brief, and those set forth in the petition, the *amici curiae* ask the Court to **GRANT** the petition and overrule *Feres v. United States*.

Respectfully submitted,

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In The
Supreme Court of the United States

ALEXIS WITT, on behalf of the
Estate of Dean Witt, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE JOHN MARSHALL LAW SCHOOL VETERANS LEGAL SUPPORT CENTER & CLINIC, THE VETERANS LEGAL ASSISTANCE CLINIC AT THOMAS JEFFERSON SCHOOL OF LAW, THE LEWIS B. PULLER, JR. VETERANS BENEFITS CLINIC AT THE COLLEGE OF WILLIAM & MARY AND MICHAEL J. WISHNIE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should the *Feres* doctrine be overruled, in whole or in part, on the ground that the FTCA should not be construed to include a non-textual exception barring claims for injuries arising out of activity incident to service, or if there is such an exception, it does not bar a claim for injury to a servicemember caused by medical malpractice at a military hospital when the service member was on leave when admitted to the hospital?

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37 the undersigned submit this brief as *Amici Curiae* in support of Petitioner Alexis Witt, on behalf of the Estate of Dean Witt, Deceased.[1] *Amici Curiae* are attorneys that have extensive experience working with veterans, servicemembers, and their families.

In 2008, The John Marshall Law School established the Veterans Legal Support Center & Clinic ("VLSC"), one of the first law school clinics in the nation dedicated to addressing the various legal issues affecting veterans. Since the primary focus of the VLSC is assisting veterans with appeals before the United States Department of Veterans Affairs ("VA"), the VLSC recognizes the difficulties encountered by veterans, servicemembers, and their families in the recovery of benefits.

The Veterans Legal Assistance Clinic ("VLAC") at Thomas Jefferson School of Law provides legal representation to the residents, alumni, and affiliates of the Veterans Village of San Diego recovery program

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[1] Pursuant to Supreme Court Rule 37, letters indicating *Amici*'s intent to file this *Amicus Curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. All parties have issued a blanket consent or have consented to the filing of this *Amicus* brief. Finally, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution specifically for the preparation or submission of this brief.

for homeless veterans with substance abuse problems. The VLAC provides representation on a wide range of civil legal matters, including child support, child custody and visitation, dissolution of marriage, Social Security and VA benefits, and bankruptcy and other credit and debt matters. The VLAC is committed to seeing that veterans and their families receive full compensation for any injuries sustained during their period of service to our country.

The Lewis B. Puller, Jr. Veterans Benefits Clinic ("VBC"), was established at the nation's oldest law school at the College of William & Mary in 2008. Its purpose is to provide Virginia's 700,000 veteran military service members – especially those who are indigent, homeless or nearly homeless – with information about, and assistance in pursuing, the service-related disability compensation benefits to which they are entitled. The VBC is unique, as it is the only legal clinic in the nation addressing not only the legal challenges, but also the demonstrated psychological effects, that our injured veterans face as they return to civilian life. The clinic is able to offer dual legal and medical services due to its partnership with Virginia Commonwealth University's Center for Psychological Services and Development ("CPSD"). It represents veterans at all stages of the VA process and in physical evaluation boards and discharge upgrades. The VBC specializes in post-traumatic stress disorder and traumatic brain injury representation.

Amicus Michael J. Wishnie is Clinical Professor of Law at Yale Law School and Director of the Veterans' Legal Services Clinic.[2] Founded in September 2010, students enrolled in the Veterans' Legal Services Clinic represent Connecticut veterans in a range of litigation and non-litigation matters, including VA benefits, discharge upgrades, and other civil matters. In its first semester, in its VA benefits cases, the clinic represented veterans before the Veterans Affairs Regional Office, Board of Veterans' Affairs, and the Court of Appeals for Veterans Claims. In addition, students represent local and national organizations in policy and litigation matters relating to the legal needs of veterans. This work has included filing two federal Freedom of Information Act lawsuits against the VA (one involving claims for military sexual trauma and the other regarding claims by servicemembers erroneously discharged on the ground of a personality disorder), as well as an *Amicus* on behalf of mental health experts in a pending challenge to the VA's new Post-Traumatic Stress Disorder regulation in the U.S. Court of Appeals for the Federal Circuit.

One of the reasons the Supreme Court gave for the decision in *Feres v. United States* is that benefits under the Veterans' Benefits Act ("VBA") are generous, swift, and efficient. In the experience of the

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[2] Institutional affiliation is listed for identification purposes only.

Amici, the VA claims process is neither swift nor efficient and the benefits conferred are not at all times generous, especially when compared to possible recoveries under the Federal Tort Claims Act ("FTCA"). As such, even if the existence of VA benefits was a sufficient rationale at the time *Feres* was decided, those benefits no longer support the continued application of the doctrine.

SUMMARY OF ARGUMENT

Since 1950, active-duty military personnel who are killed or injured incident to service have faced a complete bar to bringing possible FTCA actions against the government under this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, the Court listed several policy rationales in support of their interpretation of the FTCA. *Id.* at 142-46. These policy considerations were restated in *Johnson v. United States*, this Court's most recent affirmance of the *Feres* doctrine: (1) the distinctively federal nature of the relationship between the military and the government; (2) the existence of generous statutory death and disability benefits for servicemembers; and (3) the interest of maintaining military discipline. 481 U.S. 681, 688-91 (1987). Focusing on the second rationale, the Court stated that servicemembers are the recipients of "generous" death and disability benefits the recovery of which is both "swift and efficient." *Id.* at 688-89. The Court wrote that the presence of statutory death and disability benefits for

servicemembers and their families was a sufficient reason to bar them from bringing suit against the government. *Id.* at 689. Although it is true that Congress has provided for servicemembers and veterans through both death benefits and service-connected disability benefits under the VBA, these benefits do not compare favorably with the possible awards attainable in an action brought under the FTCA.

First, the monetary awards for wrongful death which can be obtained far outweigh what a deceased servicemember's family receives as a direct result of the death of the servicemember. Much of what the family receives pursuant to military death benefits statutes is no greater than the statutory death benefits available to family members of civilians. Nevertheless, civilians are allowed to pursue FTCA actions while servicemembers are not. Many of these benefits are considered collateral sources, and therefore are not off-setting when determining a damage award under the FTCA. The remainder of benefits which are uniquely available to servicemembers and their families hardly compare to average awards obtained under an FTCA action for wrongful death.

Second, when a servicemember is injured by negligence and subsequently discharged from the military, the servicemember must enter the veterans benefits system administered by the VA. The sheer volume of claims that the VA is charged with adjudicating leads to unacceptable levels of errors and delays.

The benefits received by servicemembers and their families for death and injuries are not always generous; nor are they always swiftly and efficiently delivered. As such, one of the bases on which the *Feres* doctrine is predicated on is in error, and this Court should grant *certiorari* to revisit the doctrine.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO CONSIDER OVERRULING *FERES* BECAUSE BENEFITS UNIQUELY OBTAINABLE BY SERVICEMEMBERS AND THEIR FAMILIES ARE NOT GENEROUS WHEN COMPARED TO POSSIBLE RECOVERIES UNDER THE FEDERAL TORT CLAIMS ACT

In *Feres v. United States*, 340 U.S. 135 (1950), this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. U.S.*, 340 U.S. 135, 146 (1950). In *Johnson v. United States*, the Court restated the factors that underlie the *Feres* doctrine: (1) the distinctively federal nature of the relationship between the military and the government; (2) the existence of generous statutory death and disability benefits for servicemembers; and (3) the interest of maintaining military discipline. 481 U.S. 681, 688-91 (1987). With respect to the second factor, the Court stated that, "the existence of these

generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries." 481 U.S. at 689.[3] Because the death and disability benefits which are only obtainable by servicemembers are not generous when compared to a possible recovery under the FTCA, the existence of these benefits should not be used to support the continued application of the *Feres* doctrine.

A. Survivors of Wrongful Death Victims Can Receive Large Damage Awards Under the Federal Tort Claims Act

The United States has paid out millions of dollars in damages over the past decade in wrongful death claims under the FTCA. A survey of recent wrongful death cases brought under the FTCA[4] identified judgments and settlements up to $9,000,000.00[5] with an average award of $2,207,794.90.[6] These

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[3] When the Court made that statement it was, in fact, resurrecting an abandoned rationale for the *Feres* doctrine that had been previously deemed "no longer controlling." *Id.* at 697 (Scalia, J., dissenting) (quoting *Shearer v. U.S.*, 473 U.S. 52, 58 n.4 (1985))

[4] Lexis Nexis, What's it Worth? (Matthew Bender 2009) § 28.2.

[5] *Kasongo v. U.S.*, 523 F. Supp. 2d 759 (N.D. Ill. 2007).

[6] Lexis Nexis, What's it Worth? (collecting cases, verdicts and settlements: *Christian v. U.S.*, 01:06-cv-00340-OWW-TAG, p. 28-2 ($2,000.00); *Robinson v. U.S.*, 1:06-CV-01973, p. 28-7 ($30,000.00); *Harris v. U.S.*, 05-C-5524 ($315,000.00); *Reed v. U.S.*, 05-05066, p.28-21 ($200,000.00); *Franz v. U.S.*, 04-6002, p. 28-26 ($1,700,000.00); *Bailey v. U.S.*, 06-1191, p. 28-43 ($4,762,236.22);

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numbers are based on many variables, such as age and surviving heirs. In wrongful death cases over the past decade in which the decedent left a surviving spouse and at least one minor child, awards and settlements ranged from $313,390.91[7] to $5,000,000.00[8] resulting in an average award of $1,824,211.21.[9] Where the decedent is survived by minor children, awards may far exceed the statutory compensation available to surviving family members of a deceased servicemember. *See Kasongo v. U.S.*, 523 F. Supp. 2d

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Kasongo v. U.S., 04-C-4901, p. 28-60 ($9,000,000.00); *Mayo-Parks v. U.S.*, 2003CV3497, p 28-65 ($1,653,123.00)).

[7] *Tello v. U.S.*, 608 F Supp. 2d 805 (W.D.Tex. 2009).

[8] *Brown v. U.S.*, 2009 WL 3359123 (W.D.Ky.) (Verdict and Settlement Summary).

[9] Cases collected from WestlawNext verdict search *Woodruff v. U.S.*, JAS SC Ref. No. 80115WL, 2001 WL 36045207 (D.S.C.) (Verdict and Settlement Summary) ($907,670.00); *Garcia v. U.S.*, 2004 WL 2059015 (S.D.Cal.) (Verdict and Settlement Summary) ($400,000.00); *Shelton v. U.S.*, 2008 WL 4964753 (S.D.Iowa) (Verdict and Settlement Summary) ($4,612,251.51); *Redwing v. U.S.*, JVR No. 468190, 2004 WL 5320781 (D.Neb.) (Verdict and Settlement Summary) ($420,000.00); *Row v. U.S.*, 2003 WL 22723086 (N.D.Ill.) (Verdict and Settlement Summary) ($485,000.00); *Pearl v. U.S.*, 2004 WL 2059056 (M.D.Fla.) (Verdict and Settlement Summary) ($2,000,000.00), *Ventimiglia v. U.S.*, 2010 WL 4079715 (N.D.Cal.) (Verdict and Settlement Summary) ($1,475,000.00); *Lowe v. U.S.*, JAS OH Ref. No. 255895WL, 2010 WL 4249166 (N.D.Ohio) (Verdict and Settlement Summary) ($4,000,000.00); *Ellis v. U.S.*, 2010 WL 1673591 (W.D.Tex.) (Verdict and Settlement Summary) ($1,796,222.23); *Thames v. U.S.*, 2009 WL 3469946 (N.D.Cal.) (Verdict and Settlement Summary) ($500,000.00); *Brown v. U.S.*, 2009 WL 3359123 (W.D.Ky.) (Verdict and Settlement Summary) ($5,000,000.00); *see also Tello*, 608 F. Supp. 2d 805 ($313,390.91).

759 (N.D.Ill. 2007) (immigrant family who lost their mother due to malpractice at a federally funded clinic was awarded $9,000,000.00 including $1,000,000.00 for loss of society to each of decedent's three children).

B. Dependency and Indemnity Compensation Payments Are Not Generous in Comparison to Damage Awards in Federal Tort Claims Act Cases

Survivors of servicemembers who die on active duty receive Dependency and Indemnity Compensation ("DIC") from the VA. 38 U.S.C. § 1310.[10] As such, eligible survivors receive a tax exempt flat-rate monthly payment. 38 U.S.C. § 1311(a). Under current DIC rates, monthly compensation payments for a surviving spouse and each minor child are $1,154.00 and $286.00 respectively. 38 U.S.C. §§ 1311(a)(1), (b). If the spouse remarries or begins living with a member of the opposite sex before the age of fifty-seven, entitlement to DIC benefits is revoked. *See* 38 C.F.R. §§ 3.55(a)(10); 3.50(b)(2).

Even assuming the spouse of the deceased servicemember does not remarry, the total annual

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[10] DIC is provided to the survivors of servicemembers who die while on active duty, like the Petitioner's decedent, or from a service connected disability during retirement. *Id.* However, servicemembers who are only injured would be entitled to receive service connected disability compensation from the VA upon discharge. 38 U.S.C. § 1110 (describing basic entitlement to service connected disability compensation).

compensation amount does not compare with the nearly $2,000,000.00 awarded on average in FTCA claims for wrongful death. *See* section I.A. *supra*. Although a damage award is fact specific and dependent on a variety of factors, the receipt of DIC should not completely preclude the survivors of servicemembers from seeking such awards in the federal courts which are available to all other citizens injured by the federal government.

C. Certain Benefits to Which Servicemembers and Their Families May Be Entitled Are Not Unique to Servicemembers

In *Johnson*, the Court found it "difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA." 481 U.S. at 690. Yet many of these benefits are of the same kind as those obtainable by civilians, particularly those in federal employ. As noted repeatedly in this Court's *Feres* jurisprudence, Congress has "omitted any provision to adjust [statutory disability and death benefits and remedies obtainable under the FTCA] and to each other." 340 U.S. at 144. Because Congress has similarly omitted any provision to adjust FTCA remedies to comparable civilian benefits, the benefits obtainable by servicemembers and their families should not be used to justify the continued application of the *Feres* doctrine.

Benefits provided to survivors of servicemembers include: a death gratuity, life insurance under the Servicemembers' Group Life Insurance ("SGLI"), and annuities under the Survivor Benefit Plan ("SBP"). However, because these benefits are no more "generous" when compared to similar death benefits received by civilians and are not off-setting as collateral sources, there is no reason to include amounts obtained through these statutory provisions when comparing benefits received to possible FTCA awards.

1. Survivors of Servicemembers, Like the Survivors of Many Other Federal Employees, Receive Insurance Payments Which Are Collateral Sources

Survivors, as beneficiaries, receive a term life insurance payment under SGLI and an annuity under the SBP program. Like most federal employees, upon enlistment or appointment to any of the uniformed services, members are automatically enrolled in a term life insurance policy under SGLI. 38 U.S.C. § 1967.[11] Beneficiaries can receive a maximum payment of $400,000.00. 38 U.S.C. § 1965.[12] In

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[11] Servicemembers can opt out of coverage, decrease the monetary coverage amount, and assign non-family beneficiaries. *See also* 38 U.S.C. § 1966 (Policies purchased and partly subsidized by the government from private insurers); 38 U.S.C. § 1969 (Monthly premiums are deducted from the member's basic pay until separation or release from active duty)

[12] In January 2004, the maximum payment was $250,000.00 for beneficiaries of an active duty staff sergeant who died in the line of duty while on permanent change of station leave status

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addition to a SGLI insurance payment, a surviving spouse (or beneficiary) is also entitled to annuity insurance under the SBP program. 10 U.S.C. § 1450. This monthly SBP annuity pays a surviving spouse 55% of the retired pay the member would have been entitled to on the day they died.[13] 10 U.S.C. § 1451. However, if the spouse is the designated beneficiary, the annuity is reduced by the amount of DIC payments received. 10 U.S.C. § 1451(c)(2).[14] Finally, if a spouse remarries before the age of fifty-five, the SBP annuity ends. 10 U.S.C. § 1450(b).

Servicemembers are not the only class of employees to receive life insurance from the federal government. Most federal employees including members of Congress and federal judges are enrolled in life

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Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419 114 Stat. 1822 (2000)

[13] To calculate the annuity, the services assume that the member died with a 100% total disability. Total disability means that the member's retired pay would be 75% of High-36 (i.e., retirement eligible, more than 20 years of service; High-36 means the highest pay grade salary for a 36 month period) or final pay (i.e., non-retirement eligible, less than 20 years of service) at time of death with the SBP annuity based on 55% of that amount. The final SBP payment calculation is taxable.

[14] When a child is the designated beneficiary, the monthly SBP payment is not reduced by the DIC. 10 U.S.C. §§ 1450(a)(1), (2). This discrepancy in the DIC offset has been criticized as a "widow's tax." Edith G. Smith, Government Relations Committee of Gold Star Wives of America, Inc., Written Statement Before The Veterans Disability Benefits Commission, February 22, 2007

insurance under the Federal Employees Group Life Insurance Act ("FEGLI") of 1954. *See* 5 U.S.C. §§ 8701 *et seq.* (authorizing the FEGLI policy). Indeed, widows and children of deceased federal employees receive monthly compensation under a program similar to SBP, provided by the Federal Employment Compensation Act ("FECA"). 5 U.S.C. §§ 8133 *et seq.* (2010).[15] Despite the existence of FEGLI and FECA, civilian federal employees are not barred from bringing claims under the FTCA.

As has been settled by this Court, plaintiffs under the FTCA are able to recover damages allowed under state law. *Molzof v. U.S.*, 502 U.S. 301, 305 (1992). Many states, including California, follow the common law "collateral source" rule which prevents a tortfeasor from reducing damages paid to the plaintiff from a collateral source. *See, e.g., Lund v. San Joaquin Valley R.R.*, 31 Cal. 4th 1, 9-10 (Cal. Sup. Ct. 2003) (citing *Hrnjak v. Graymar, Inc.*, 4 Cal. 3d 725, 729 (Cal. Sup. Ct. 1971)) (noting that California continues to accept the collateral source rule).[16] States

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[15] A qualifying surviving spouse is eligible to receive 45% of the monthly pay of the deceased federal employee, while 15% is added for each additional child, not to exceed 75%. 5 U.S.C. § 8133(a)(3). The 75% maximum benefit received under FECA is higher than the 55% received under SBP.

[16] The collateral source rule has also been adopted by the federal courts. *See Eichel v. New York Central R. Co.*, 375 U.S. 253, 254 (1963) (stating that "[r]espondent does not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner" in reference to the receipt of payments pursuant to

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with similar rules prevent defendants from limiting their liability based on benefits paid to the plaintiff from an independent source.[17] In these states, such benefits which are considered from a collateral source include both life insurance payments and retirement or disability payments. *See, e.g., Helfend v. So. Cal. Rapid Transit Dist.*, 2 Cal. 3d 1, 10 (Cal. Sup. Ct. 1970) (recognizing that California follows the collateral source rule for insurance payments); *De Cruz v. Reid*, 69 Cal. 2d 217, 223-24 (Cal. Sup. Ct. 1968) (recognizing that California follows the collateral source rule for workers' compensation payments).

As such, Petitioner's receipt of SGLI and annuities under SBP would be considered collateral sources. SGLI is simply a term life insurance policy which is partially funded by premiums deducted from

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the Railroad Retirement Act. Although California has passed a statute limiting the rule in cases of medical malpractice, the statute is inapplicable in a case such as this due to the David Grant Medical Center not being a "health care provider" under the statute. *See* West's Ann.Cal.Civ.Code § 3333.1(c)(1), § 3333.2(c)(1) (defining "health care provider" as " . . . any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code [of California]").

[17] *See, e.g., St. Francis De Sales Federal Credit Union v. Sun Ins. Co. of New York*, 818 A.2d 995, 1001-02 (Me. Sup. Ct. 2002) (noting the collateral source rule is used in Maine), *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611, 618 (Miss. Sup. Ct. 2001) (same). *But see, e.g., Swanson v. Brewster*, 784 N.W.2d 264, 270 (Minn. Sup. Ct. 2010) (recognizing that Minnesota had abrogated the collateral source rule through statute).

a servicemember's military pay. 38 U.S.C. § 1969(a)(1). Annuities paid to survivors under SBP are intended to replace the retirement pay servicemembers would have been entitled to but for their untimely demise. 10 U.S.C. § 1450(c)(3). Such life insurance payments would be considered a collateral source.

States vary on their treatment of the collateral source rule; however, such geographical inequity is certainly better than a complete bar to recovery. *See Johnson*, 481 U.S. 681, 695-96 (Scalia, J., dissenting) ("nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery"). Because the collateral source rule would prevent the receipt of death gratuity, SGLI, and SBP from reducing Petitioner's damages in an FTCA action, these payments should not be considered when determining whether VBA benefits are so "generous" as to completely preclude actions by servicemembers under the FTCA.

2. Since Death Gratuity Is Not Limited to Servicemembers, It Should Not Be Used as a Justification for Limiting Only Servicemembers

Survivors of servicemembers who die on active-duty while in the line of duty receive a death gratuity to recognize the significant sacrifice evoked by the loss of life. 10 U.S.C. § 1475.[18] The $100,000.00 death

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[18] *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 647, 117 Stat. 1392, 1397 (2003) (Congress

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gratuity payment that survivors receive, even as a result of a wrongful death, is not generous when compared to civilian death benefits.

Survivors of certain groups of civilians also receive a statutory death gratuity. In particular, survivors of city, state, and federal government law enforcement officers and firefighters who die in the line of duty may be entitled to a lump sum payment of $250,000.00 under the Public Safety Officers' Benefits Act. 42 U.S.C. §§ 3796 *et seq*. *See also* GAO Report, Survivor Benefits for Servicemembers and Federal, State, and City Government Employees, GAO-04-814 (July 2004). Civilians employed as contractors who die "of injuries incurred in connection with the employee's service with an Armed Force in a contingency operation" receive a death gratuity of $100,000.00. 5 U.S.C. § 8102a(a). Additionally, victims of the September 11, 2001 attacks received an average compensation payment of $2,082,128.00 under the Department of Justice September 11th Victim Compensation Fund. *See* Department of Justice,

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increased the death gratuity from $6,000.00 to $12,000.00 effective for deaths occurring after September 10, 2001) *and* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No 109-163, § 664, 119 Stat. 3136, 3316 (2006)) (Increased the death gratuity from $12,000.00 to $100,000.00 following concern that death gratuity payments for survivors were not keeping pace with similar compensation made to civilian first responders and civilian casualties from terrorist attacks). *See also* "Final Report. Review of Military Death Benefits", SAG Corporation, GS-10F-0312L, April 2004.

September 11th Victim Compensation Fund, *available at* http://www.justice.gov/archive/victimcompensation/payments_deceased.html. Despite these benefits, federal employees, civilian contractors, first responders, and victims of terrorist attacks are not barred by the *Feres* doctrine from bringing claims against the government.

II. THIS COURT SHOULD GRANT REVIEW TO CONSIDER OVERRULING *FERES* BECAUSE RECOVERY OF BENEFITS UNDER THE VETERANS' BENEFITS ACT IS NEITHER SWIFT NOR EFFICIENT

Central to the Court's holding in *Feres* was the assumption that compensation for servicemembers was "simple, certain, and uniform." *Feres*, 340 U.S. at 144. In *Johnson,* the Court reiterated that assumption, stating that "the recovery of benefits is 'swift [and] efficient,'" under the VBA. 481 U.S. at 690 (quoting *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673 (1977)). However, the reality is that the VA, the agency that administers benefits to veterans, is currently working under a substantial backlog. Veterans and the families of veterans who find themselves in the VA claims process are facing significant delays at both the initial and appeal levels.

The VA compensation system does not currently resemble the simple and certain process referenced by the *Feres* Court over 50 years ago. There are numerous and potentially time-consuming steps that the VA undertakes before an initial decision is

issued.[19] As a whole, the VA regional offices ("VARO") take an average of 170 days to render an initial decision after a claim for benefits has been submitted.[20] The number of initial claims pending at the end of fiscal year 2008 was about 343,000.[21] If the original claim is denied or if an error exists with the initial decision issued by the VA, then veterans have the option to appeal to the next level of the administrative claims process, the Board of Veterans' Appeals ("BVA").

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[19] United States Government Accountability Office, Military and Veterans Disability System, Preliminary Observations on Evaluation and Planned Expansion of DOD/VA Pilot 2-3 (2010) "VA's disability compensation claims process starts when a veteran submits a claim listing the medical conditions that he or she believes are service connected. . . . For each claimed condition, VA must determine if there is credible evidence to support the veteran's contention of a service connection Such evidence may include the veteran's military service records and treatment records from VA medical facilities and private medical service providers. Also, if necessary for reaching a decision on a claim, VA arranges for the veteran to receive a medical examination. . . . Once a claim has all of the necessary evidence, a VA rating specialist evaluates the claim and determines whether the claimant is eligible for benefits If so, the rating specialist assigns a percentage rating." *Id.* (footnote omitted).

[20] Department of Veterans Affairs FY2010 Performance and Accountability Report, Part II – Performance Measures Tables 128 (2010).

[21] United States Government Accountability Office, Veterans' Disability Benefits, Preliminary Findings on Claims Processing Trends and Improvement Efforts Title page, "What the GAO Found" (2009).

In the VA's own estimation, only 84% of original decisions are accurately decided.[22] Veterans in certain geographic locations encounter inaccuracy rates as high as 36%,[23] leading to a dramatic lack of uniformity in

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[22] Department of Veterans Affairs FY2010 Performance and Accountability Report, Part II – Performance Measures Tables 128 (2010). This statistic is explained in Part I – Performance Shortfall Analysis 85 (2010). "The [inaccuracies are] largely due to deficiencies in the development of claims, particularly involving either missing examinations/medical opinions or where claims were rated based on inadequate examinations/opinions. Additionally, attrition of experienced personnel, especially in positions where extensive training is required, has been detrimental in terms of both production and quality."

[23] VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Waco, TX i (2010). *See also* VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Milwaukee, WI 2 (2011) (error rate 22%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Denver, CO i (2010) (error rate 21%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Jackson, MS i (2010) (error rate 24%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Philadelphia, PA 1 (2010) (error rate 33%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Albuquerque, NM i (2010) (error rate 36%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office St Paul, MN i (2011) (error rate 15%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Detroit, MI 1 (2010) (error rate 21%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Togus, ME 1 (2010) (error rate 26%); VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Roanoke, VA 1 (2010) (error rate 25%).

the administration of VA benefits.[24] At a minimum, such errors can lead to significant delays in the recovery of benefits.

Office of Inspector General reports for individual VAROs provide insight into the types of errors that occur in the claims process. For instance, at the VARO in Albuquerque, New Mexico, top-level positions were left vacant, and one of the positions was filled by multiple acting managers who received no training or guidance.[25] In Denver, Colorado, "no review process was in place to ensure staff input required dates for future medical exams in the electronic record. As a result, veterans . . . did not always receive accurate benefits."[26]

The appeal of claims to the BVA level of the administrative scheme carries an even larger delay than that seen at the initial stage of the claims

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[24] *See infra* note 23.

[25] VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Albuquerque, NM i (2010) "During FY 2009, the VARO Director's position was vacant for approximately 3 months and from FY 2009–2010, the Veterans Service Center Manager (VSCM) position was vacant for approximately 6 months Both positions are key leadership positions within the VARO. Three different acting managers filled the vacant VSCM position, two of whom reported they never received training or guidance on the responsibilities associated with that position. We believe these vacancies were a contributing factor to the high error rates for the claims we reviewed " *Id.*

[26] VA Office of Inspector General, Office of Audits & Evaluations, Inspection of the VA Regional Office Denver, CO 4 (2010)

process. The inefficiency in the administration of benefits is perhaps best exemplified by the fact that VA reports appear unable to agree on exactly how long it takes to process a BVA claim. One report listed that on average, the total elapsed processing time to issue a BVA decision in fiscal year 2009 was 1,082 days.[27] However, another report calculated the elapsed processing time at 709 days for fiscal year 2009.[28] In either case, it is a long wait for a veteran in need to receive benefits. Unfortunately, the lengthy wait in no way guarantees an accurately rendered BVA decision.

A veteran seeking to appeal a BVA decision must file a notice of appeal with the United States Court of Appeals for Veterans Claims ("CAVC").[29] In 2009, the CAVC only affirmed approximately 17% of the 3,270 BVA decisions that it reviewed.[30] Astonishingly, in

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[27] Board of Veterans' Appeals Report of the Chairman 16 (2009)

[28] Department of Veterans Affairs FY2010 Performance and Accountability Report Part II – Performance Measures Tables 133 (2010).

[29] United States Court of Appeals for Veterans Claims Annual Reports FY2000-09, *available at* http://www.uscourts.cavc.gov/annual_report/. "The United States Court of Appeals for Veterans Claims is a national court of record, established under Article I of the Constitution of the United States. The Court has exclusive jurisdiction to provide judicial review of final decisions by the Board of Veterans' Appeals, an entity within the Department of Veterans Affairs." *Id.*

[30] United States Court of Appeals for Veterans Claims Annual Reports FY2000-09, *available at* http://www.uscourts.cavc.gov/annual_report/ (3,270 merits decisions in 2009; 571 decisions affirmed in 2009).

that same year, the CAVC granted 2,385 Equal Access to Justice Act applications.[31] This means that in a large number of claims the government had not taken a substantially justifiable position. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 789 (2008) (citing 28 U.S.C. § 2412(d)(1)(A)) (stating the relevant standard required for EAJA awards).

One cause of the delay in claims processing times is the crushing backlog of cases. The BVA began fiscal year 2010 with a backlog of 40,688 claims.[32] The disconcerting fact is that the number of claims pending at the BVA level has increased over the past year.[33]

The complexity of the VA claims process has not gone unnoticed. In 2006, the United States Senate Committee on Veterans' Affairs reported that "there has been a growing recognition that the claims process is no longer a 'relatively uncomplicated procedure.' Sen. R. 109-297 (July 31, 2006) (*available at* LEXIS at 109 S. Rpt. 297). The VA has likewise recognized that the process is no longer simple. In testimony before Congress, then-Under Secretary for Benefits, Joseph Thompson, stated: 'The Veterans Disability Compensation Program is the most complex disability claims system in the Federal government.'"

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[31] *Id.*

[32] Board of Veterans' Appeals Report of the Chairman 14 (2009) (There were 36,452 cases pending at the start of fiscal year 2009 and 40,688 cases pending at the end of fiscal year 2009)

[33] *Id.*

Hearing on the Department of Veterans Affairs Claims Adjudication and Pending Legislation Before the Committee, Senate Committee on Veterans' Affairs, July 20, 2000, 106th Cong., 2d Sess. (testimony of the Honorable Joseph Thompson).

As the wars in Iraq and Afghanistan continue, more servicemembers will be seeking benefits from the VA upon their return home. Even though the VA is one of the largest administrative agencies in the United States Government, or perhaps for that reason, it is still unable to handle in a swift and efficient manner the enormous volume of benefits claims that it receives.

CONCLUSION

The benefits available to the men and women of our nation's armed forces, or their survivors, for injuries suffered incident to their service are not so generous, swift, or efficient such as to support a policy rationale for completely denying redress of their injuries under the FTCA. The monetary benefits of a damages award under the FTCA greatly outweigh such benefits which are uniquely available to the military. Most of the benefits at issue are not of a kind unique to military service, and are available for many in civilian government service. Servicemembers who survive their injuries frequently find their claims pending in a lengthy administrative process at the VA. The adjudication of such claims become subject to

errors and lengthy delays which hardly embody the swift and efficient compensation envisioned by the Court in *Feres* and *Johnson*. Therefore, the mere existence of such benefits available to service-members and their families cannot be considered an independent basis for upholding the *Feres* doctrine.

Respectfully submitted,

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In The
Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF MAJOR GENERAL (RETIRED) CHARLES E. TUCKER, JR., AND THE INTERNATIONAL HUMAN RIGHTS LAW INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), which bars active-duty military personnel from bringing claims against the government for injuries arising out of activity incident to service, should be overruled.

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INTEREST OF *AMICI CURIAE*[1]

Major General (Retired) Charles E. Tucker (USAF) served for twenty-seven years in the United States Air Force, Air Force Reserve, and Air National Guard. General Tucker served on active duty as an Air Force Judge Advocate for nine years. From 1989 to 1992, he was an Assistant Professor of Law at the United States Air Force Academy. In 2004, he served as Military Legal Advisor to the United States Ambassador to Iraq; in 2005 he served in the Department of Defense Office of General Counsel. General Tucker has deployed in support of operations in Honduras, Brazil and Central Asia and served as Legal and Economic Advisor to the High Representative in Bosnia and Herzegovina. Between 2005 and 2008, he served as Chief of Staff of the Wisconsin Air National Guard. In 2001, he was named the Air National Guard's Outstanding Judge Advocate. General Tucker's other decorations include the Legion of Merit, Bronze Star, Defense Meritorious Service Medals, and campaign medals from Kosovo, Iraq Medals, and the Global War on Terrorism Medal.

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Prior to his military retirement, General Tucker was Director of Joint Doctrine, Training and Force Development for the National Guard Bureau. He developed training and exercise policies to maintain readiness in the National Guard. He oversaw the Joint Commander Training Course, the Joint State Staff Officer Course, and the National Guard Homeland Defense & Joint Interagency Training Centers. General Tucker thus has had firsthand experience with the issues of military discipline, readiness, and risk management that lie at the heart of this case.

General Tucker is now Executive Director of the International Human Rights Law Institute (IHRLI) at DePaul University College of Law. IHRLI's purpose is to link scholarship, outreach, and educational activities with the design and management of human rights and rule of law programs throughout the world. This interest in advancing the rule of law extends not only to civilians but also to the rights of men and women currently serving in our armed forces. This case, which concerns the ability of servicemen and women to seek redress when their rights are violated by the Government, thus falls at the core of IHRLI's mission.

STATEMENT

The Federal Tort Claims Act (FTCA) permits private claims against the United States

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). This statute "for the first time recognized the general principle of governmental liability in tort." Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 861 (6th ed. 2009) ("Hart & Wechsler"). Justice Scalia has aptly pointed out that, "[r]ead as it is written, this language renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *United States v. Johnson*, 481 U.S. 681, 693 (1987) (Scalia, J., dissenting).

That is not how this Court has read the FTCA, however. In *Feres v. United States*, 340 U.S. 135 (1950), this Court held that active-duty military personnel may not sue the government for injuries arising out of activity incident to service. Subsequent cases have made clear that this broad immunity rests primarily on concerns about military discipline and insulating military decisionmaking from intrusive

judicial review, as well as on the assumption that the Veterans' Benefits Act provides an alternative remedial scheme for injured servicemen that supplants FTCA liability. These rationales are grounded neither in the text of the FTCA nor in the documented intent of Congress, but rather in the federal courts' own policy judgments.

The Petitioners' filing in this case amply demonstrates the confusion that *Feres* continues to create in the lower courts. This *amicus* brief focuses instead on two broader sets of inconsistencies. The first is between *Feres* and the policy justifications it purports to serve. *Feres* did not create a blanket rule of military immunity; rather, it permits suits implicating military affairs in many contexts, such as when the plaintiff is a civilian or an off-duty serviceman. The doctrine thus fails as an effort to insulate military affairs from judicial review, and such review occurs on a regular basis. Worse, no actual evidence shows that *Feres* actually fosters military discipline or improves military decisionmaking. There is ample reason to believe that, by preventing redress for injured military personnel and their families, *Feres* may actually hurt military morale.

The *Feres* doctrine is also fundamentally inconsistent with this Court's more general approach to statutory construction. The FTCA includes an extensive list of statutory exceptions to liability, many of which target the core military interests that *Feres* supposedly protects. Yet *Feres* was decided in an era of freewheeling judicial adaptation of statutes to fit

the felt needs of the law, including implied rights of action and implied defenses against federal liability. The Court's contemporary approach, by contrast, stresses statutory text and the demonstrable intent of the enacting Congress; accordingly, this Court has generally refused to imply new private rights of action, and it has treated arguments for implied defenses skeptically. Under contemporary jurisprudence, the Court would certainly view the specific defenses in the FTCA as exhausting the statute's provision for military necessity and eschew creating a broad immunity as a matter of federal common law.

Feres is thus ripe for reexamination. As the Petitioners' filing demonstrates, sixty years of frequent judicial construction has failed to generate a workable rule for when *Feres* applies and when it does not. Nor is there meaningful government reliance on *Feres*. The Government does not claim a right to injure its military personnel with impunity, and in any event the many exceptions to *Feres* ensure that the Government is not reliably or predictably shielded from liability. As a factual matter, both the structure of the military and the security environment in which it operates have changed significantly in the past sixty years; likewise, the disparity between the *Feres* regime and the civil tort system has grown. Time too has undercut the legal assumptions of *Feres* – both for this Court's approach to statutory construction and the array of significant legal claims for which *Feres* cuts off redress. This Court should reconsider its

decision in *Feres* and return to the statutory structure that Congress actually enacted in the FTCA.

ARGUMENT

I. The *Feres* Doctrine, as Currently Construed, Fails to Protect the Interests It Purports to Serve.

This Court has relied on three rationales to justify the *Feres* doctrine: the "distinctively federal . . . character" of the relationship between the Government and members of the armed forces, *Feres*, 340 U.S. at 143; "the existence of . . . generous statutory disability and death benefits" for injured servicemen and women under the Veterans' Benefits Act, *id.* at 144; and concerns that FTCA claims by members of the armed forces for injuries incident to service "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness," *United States v. Shearer*, 473 U.S. 52, 59 (1985).[2] This Court has deemed the first and

[2] *Feres* itself offered a fourth rationale — that no form of "parallel private liability" is analogous to servicemembers' claims for service-related injuries. *See* 340 U.S. at 141-42. But this Court has rejected this parallel-private-liability requirement in related contexts under the FTCA, *see, e.g.*, *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955), and this Court's more recent *Feres* doctrine cases have not relied on it. *See Johnson*, 481 U.S. at 688-91; *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72 (1977).

second rationales "no longer controlling," leaving the doctrine's primary focus on interference with military discipline and decisionmaking. *See id.* at 57, 58 n.4. But the current doctrine maps poorly onto any of these rationales. Worse still, its unfair treatment of servicemen threatens actually to undermine the values that the *Feres* doctrine was designed to protect.

A. No evidence supports the *Feres* doctrine's assumption that nonliability protects military decisionmaking and discipline.

Although *Feres* itself did not rely upon it, subsequent cases have rested the doctrine almost entirely on concerns about military discipline and decisionmaking. As this Court said in *United States v. Muniz*, 374 U.S. 150 (1963):

> In the last analysis, *Feres* seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.

Id. at 162. Although the Court's concern is intuitively understandable, it rests on no actual *evidence* that either military discipline would suffer or military decisionmakers would be over-deterred if they were subjected to FTCA liability.

As one leading scholar of military law has pointed out, "[t]he military discipline rationale . . . lacks any foundation in empirical or academic studies of the military. . . . To the contrary, a strong argument can be made that the primary elements of cohesion and discipline in the military have virtually nothing to do with potential civil liability." Jonathan Turley, Pax Militaris: *The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 17 (2003). After all, "[t]here are no studies that suggest the existence of internal grievance processes, federal litigation, congressional complaints, or media coverage diminishes military readiness or discipline." *Id.* at 26. Any decision to carve out a policy-based exception to a broad statutory provision for liability ought to at least rest on an empirical demonstration that the relevant interests really are implicated. Sixty-one years after this Court's creation of the *Feres* defense, it is past time to revisit the doctrine's conclusory assumptions.

B. Exceptions to the doctrine ensure that courts frequently consider the military's internal affairs.

If the point of the *Feres* doctrine is to prevent the judiciary from inquiring into sensitive military affairs, then the doctrine has plainly failed. As Justice Scalia pointed out in his dissent in *Johnson*, courts may well have to inquire into military decisionmaking in at least three scenarios notwithstanding *Feres*. First, civilians may sue under the FTCA in cases that

implicate military affairs: if, for example, a military air traffic controller negligently caused a military plane to crash into a civilian's house, *Feres* would not bar the homeowner's suit. Similarly, civilians injured in military hospitals can and do sue under the FTCA. *See, e.g.*, *Romero v. United States*, 954 F.2d 223, 225 (4th Cir. 1992); *Burgess v. United States*, 744 F.2d 771 (11th Cir. 1984). Second, military personnel may sue if their injury is not "incident to service" – if, for example, they are on leave when injured. And third, when a servicemember's injury is caused by a civilian contractor, as in *Johnson*, the servicemember may sue the civilian rather than the United States – even if the servicemember's injury is incident to service and even if judges would have to inquire into military decisionmaking to resolve the claim.

Moreover, the *Feres* doctrine generally does *not* bar claims for nondamages relief.[3] These claims may include challenges to military practices when the plaintiff seeks only declaratory or injunctive relief, as well as judicial review of courts-martial proceedings by federal writs of *habeas corpus*. The Uniform Code of Military Justice provides a complaint procedure for "[a]ny member of the armed forces who believes himself wronged by his commanding officer," 10 U.S.C. § 938, and the military's response to these complaints

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[3] *See* Turley, 71 Geo. Wash. L. Rev. at 22 ("[T]he *Feres* doctrine does not actually protect the military from judicial review but rather protects it from monetary damages in lawsuits by service members.")

is subject to judicial review, *see, e.g.*, *Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973) (reviewing a § 938 proceeding via a petition for a writ of mandamus). Similarly, 10 U.S.C. § 1552 provides a civilian-review-board procedure for correcting military records, and that procedure is also subject to judicial review, *see Ayala v. United States*, 624 F. Supp. 259, 263 (S.D.N.Y. 1985).

Given this pattern of judicial review and potential liability, it is hard to think of any areas of military decisionmaking in which military personnel may operate free from concern about potential lawsuits. Areas least likely to involve either civilians or off-duty soldiers – such as combat orders – are already covered by an explicit statutory exception to the FTCA. Nor does the pattern of actual liability track any logical need to maintain disciplined relationships between servicemembers and their superior officers. No such relationship exists in medical malpractice cases, whereas current law permits suits against a civilian contractor even if he was acting under orders from the plaintiff's superior officer. This patchwork of judge-made immunity has little to recommend it vis-à-vis the carefully considered statutory framework of the actual FTCA.

C. Preventing servicemembers and their families from obtaining redress for their injuries may well undermine military morale and discipline.

American law's many broad waivers of sovereign immunity have typically assumed that accountability enhances – rather than undermines – respect for government authority. That imperative is no less true within the military. For example, *Johnson* denied relief to the family of a serviceman whose helicopter was directed into the side of a mountain by the instructions of a negligent air traffic controller. Justice Scalia pointed out that "the morale of Lieutenant Commander Johnson's comrades-in-arms w[ould] not likely be boosted by news that his widow and children w[ould] receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death." 481 U.S. at 700 (Scalia, J., dissenting). This adverse effect on morale is particularly likely to be true in areas – like the medical malpractice in this case – where civilians with analogous injuries could expect a far more generous recovery.

Beyond the general corrosive effect on morale of denying redress for injured servicemembers and their families, *Feres* may undermine morale and discipline by weakening legal regimes designed to promote the rule of law within the military community. Federal courts have applied *Feres*, for example, to bar civil

rights claims involving racial discrimination, hazing, and retaliation against whistleblowers.[4] One need not deny that intrusive judicial scrutiny may sometimes interfere with military discipline and morale to recognize that the breakdown of legal rules guaranteeing servicemembers rights of equality, basic personal security, and fair treatment likewise threaten to cause demoralization and resentment. How to manage these competing concerns may be a difficult question, but it is hardly obvious that courts can answer it better than Congress has by crafting specific exceptions to FTCA liability.

These problems are unlikely to decrease in importance in the foreseeable future. Congress has recently repealed the military's "Don't Ask, Don't Tell" policy and required integration of gay and lesbian servicemembers into military society.[5] Maintaining

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[4] *See, e.g.*, *Chappell v Wallace*, 462 U.S 296 (1983) (extending *Feres* to bar *Bivens* relief for constitutional claims involving racial discrimination against servicemembers), *Matreale v. New Jersey Department of Military & Veterans Affairs*, 487 F.3d 150 (3rd Cir 2007) (applying *Feres* to bar suit by National Guard Officer alleging retaliation for cooperating with a sexual harassment investigation); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678 (1st Cir 1999) (applying *Feres* to bar a serviceman's claims for severe hazing by his fellow servicemen); *Wright v Park*, 5 F.3d 586 (1st Cir 1993) (applying *Feres* to bar a whistleblower's claims against National Guard officers alleging that he was cashiered for reporting safety violations and unauthorized use of military aircraft).

[5] *See* Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. Times, Dec. 18, 2010 (available at http://www.nytimes.com/2010/12/19/us/politics/19cong.html).

legal restraints on discrimination and harassment within the military community will be central to this effort. Likewise, respect for human rights and the rule of law has become increasingly critical to the legitimacy of American military operations in the War on Terror and elsewhere, as well as to our nation's ability to maintain domestic and international support for those operations. The *Feres* doctrine weakens the statutory structure designed to enforce those values among military personnel, both by denying redress to servicemembers whose rights are violated and undermining statutory protections for those who report violations. To the extent that it does this, *Feres* undermines the military's ability to achieve its mission.

All of these considerations require a fine balance among competing imperatives. The problem is that the *Feres* doctrine is an extremely blunt instrument for striking those balances. Its "incident to service" criterion is both over- and under-inclusive for the values at stake, and the factors for *applying* that criterion are so indeterminate that they deny military decisionmakers any benefit of predictability. Congress is simply better suited than the courts to make these judgments.

D. The current scheme of veterans' benefits does not provide an exclusive or adequate alternative to FTCA suits.

The D.C. Circuit has aptly observed that "the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable." *Hunt v. United States*, 636 F.2d 580, 598 (D.C. Cir. 1980). Benefits under the Veterans' Benefits Act (VBA), 38 U.S.C. §§ 301 *et seq.*, do not explain the *Feres* doctrine because this Court has allowed servicemen to recover under the FTCA even when they had already received benefits under the VBA.[6] The VBA does not limit recovery to injuries incident to service, and as a result servicemembers may recover under both the FTCA and the VBA in all the scenarios described above, including when they are injured off duty. That result would make no sense if Congress indeed intended the VBA to be an exclusive remedy. Nor is there any reason to think that VBA benefits are any less adequate a remedy for servicemembers' injuries – or their families' losses – when injuries are not incident to service.

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[6] *See United States v. Brown*, 348 U.S. 110, 113 (1954) (concluding that because "Congress had given no indication that it made the right to compensation [under the VBA] the veteran's exclusive remedy, the receipt of disability payments did not preclude recovery under the Tort Claims Act"); *Brooks v. United States*, 337 U.S. 49 (1949) (allowing recovery to off duty servicemen injured by a civilian Army employee notwithstanding VBA benefits).

More fundamentally, the existence of an alternative remedial scheme is an unpersuasive reason for courts to create a bar to bar recovery under a statutory cause of action like the FTCA. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), this Court held that the existence of a specific statutory remedy under the Social Security Act foreclosed federal common law claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for due process violations in the administration of Social Security benefits. It was critical to the Court's reasoning, however, that *Bivens* is an implied remedy. The Court stressed that courts should ordinarily defer to Congress's own balancing of the costs and benefits of providing individual remedies in a particular context. *See* 487 U.S. at 421-23.

That reasoning simply does not apply when Congress has prescribed an express remedy like the FTCA. That remedy is *part* of the statutory balance, and if Congress thought allowing veterans' benefits alongside FTCA recovery would be excessive, it could easily have calibrated the relationship between those remedies more precisely in the relevant statutes. The federal courts have no warrant to recast that balance by creating a common law defense like the *Feres* doctrine.

II. The *Feres* Doctrine Inappropriately Intrudes on Congress's Remedial Scheme Under the FTCA.

As this Court has noted, the FTCA "was the product of nearly thirty years of congressional consideration and was drawn with numerous substantive limitations and administrative safeguards." *Indian Towing Co.*, 350 U.S. at 68. Both the structure and history of the statute indicate that extension of FTCA liability to the military was by no means unexpected. Unsurprisingly, a number of specific exceptions shield the core military interests that the *Feres* doctrine purports to protect. Given this carefully calibrated statutory scheme, the interposition of a blanket federal common law defense is both unnecessary and disruptive.

A. Textual exemptions under the FTCA adequately protect legitimate federal interests in military policy.

The FTCA expressly limits its broad waiver of sovereign immunity and provision for tort remedies against the Government with several exceptions. The most obviously relevant exception absolves the Government from liability on "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). This provision is directed to the same core concerns as the *Feres* doctrine, but its approach is much more focused and limited.

Other portions of 28 U.S.C. § 2680 address legitimate concerns arising out of servicemembers' suits. One exception covers both "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," and any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* § 2680(a). The first part of this exemption prevents the FTCA from becoming a vehicle for challenging codified military policy; the second shields military decisionmakers from challenges to virtually any command or disciplinary decisions.

Other relevant exemptions include § 2680(k), which covers "[a]ny claim arising in a foreign country," and § 2680(h), which prohibits claims for most intentional torts. These exemptions foreclose claims arising in the most sensitive military environments and that might most readily be asserted to oppose military orders and disciplinary measures. Taken together, the result is a statutory regime that responds well to legitimate concerns about military discipline and effective military decisionmaking. As Justice Scalia concluded in *Johnson*, "Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for us to supplement – i.e.,

revise – that congressional disposition." 481 U.S. at 693 (Scalia, J., dissenting).

The FTCA's textual exemptions, moreover, safeguard the Government's legitimate interests more rationally than the *Feres* doctrine. That is because the exceptions are not limited to servicemen on active duty: they cut off *all* suits, unlike the *Feres* doctrine. And although some exemptions – such as that for discretionary functions – may not always be perfectly pellucid, they nonetheless compare favorably to the unpredictable and indeterminate tests applied in the lower courts for injuries "incident to service." This is not an area where Congress failed to do its job and rationally provide for legitimate governmental interests the FTCA implicates. The *Feres* Court should not have intervened simply on the ground that it might have handled some of the relevant tradeoffs differently.

B. The *Feres* doctrine is out of step with this Court's jurisprudence on implied rights of action and federal common law.

In *Feres*, the Court insisted that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." 340 U.S. at 139. The Court actually went further, carving out a class of cases within the plain text and imposing on that class

a nontextual rule of blanket immunity. But the Court's overall approach reflected the judicial norms of the time, which accorded federal courts broad latitude to frame remedies under federal statutes. Eight years earlier, for example, this Court had said that "[w]hen a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted." *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942).

This view of the judicial role reached its high watermark a decade and a half after *Feres* in *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), which asserted that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Borak* was a case about implied rights of action for private plaintiffs under federal statutes, when those statutes prohibited certain conduct but did not specify who was entitled to enforce the law. But implying a defense – as the Court did in *Feres* – is no different in principle from implying a right of action. Each implication presupposes that courts should supplement the text of federal statutes to ensure that they "make sense" in light of Congress's purposes and the overall policy of the regulatory scheme – as courts perceive them.

Put simply, this Court does not do things that way anymore. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), this Court quoted the language from *Borak* above and then said that "[w]e abandoned that understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975) . . . and have not returned to it since." *Id.* at 287. As *Sandoval* makes clear, this Court has been largely unwilling to recognize new implied rights of action, and it has narrowly construed old ones, such as the *Bivens* case's implied remedy for constitutional violations by federal officers. *See generally* Hart & Wechsler at 705-07, 735-40.

This Court has recognized that implied defenses to statutory remedies raise similar problems. In *United States v. Oakland Cannabis Buyer's Coop.*, 532 U.S. 483 (2001), the Court rejected an argument for an implied "necessity" defense to the crime of marijuana manufacture and distribution under the federal Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* "As an initial matter," the Court said, "we note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute." *Id.* at 490. The Court then quoted *United States v. Rutherford*, 442 U.S. 544, 559 (1979), which held that "[w]hether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." Although *Oakland Cannabis* found the Controlled Substances Act's terms foreclosed the necessity defense and thus did not have to decide whether the Court could ever recognize such an implied defense, the Court adopted

a skeptical attitude toward such defenses on the ground that they "would entail a social balancing that is better left to Congress." 532 U.S. at 491 n.4.

Oakland Cannabis's reservation of the question whether federal courts could imply a nontextual defense to a federal statute imposing liability demonstrates just how far the ground has shifted since *Borak* and *Feres*. Like the health-based necessity defense in *Oakland Cannabis*, the military necessity defense recognized in *Feres* entails "a social balancing that is better left to Congress." As we have demonstrated, Congress has already done that balancing by enacting specific defenses that target the key interests that *Feres* seeks to promote.

C. This Court should not infer endorsement of the *Feres* doctrine from Congress's failure to eliminate it by statute.

In *Johnson*, this Court emphasized that although "Congress 'possesses a ready remedy' to alter a misinterpretation of its intent," Congress has not elected to change the *Feres* rule "in the close to 40 years since it was articulated." 481 U.S. at 686 (quoting *Feres*, 340 U.S. at 138). But although this Court has sometimes interpreted Congress's failure to override a settled judicial interpretation as acquiescence, it has also long recognized the dangers of inferring congressional intent from legislative inaction. In *Helvering v. Hallock*, 309 U.S. 106 (1940), for example, Justice

Frankfurter said that "[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities." *Id.* at 119-20. In *Zuber v. Allen*, 396 U.S. 168 (1969), the Court explained that "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Id.* at 185 n.21.[7]

This hesitance is well founded. The leading academic treatment of legislative inaction describes many serious difficulties with presuming the correctness of precedents simply because Congress has not overturned them. First, cases inferring intent from inaction "are inconsistent with the traditional proposition that the legislative 'intent' relevant to statutory interpretation is the intent of the enacting Congress, not the continuing intent of subsequent Congresses." William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 95 (1988). Moreover, "the structure of Congress makes it far more likely that something will not happen (inaction) than that it will (action)." *Id.* at 98. We can thus infer little about Congress's actual views from inaction:

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[7] Legislative action may be more persuasive in some circumstances than others *Zuber* suggested that "[i]ts significance is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme." 396 U.S. at 185 n.21. There is, of course, no such ongoing supervision over the FTCA

> The legislative agenda is severely limited; to gain a place on that agenda, a measure must not only have substantial support, but be considered urgent by key people (such as the President and/or the party leadership in Congress). Even if a proposal finds a place on the legislative agenda, it is usually doomed if there is substantial opposition, whether or not most legislators favor it, because of the variety of procedural roadblocks opponents may erect. Consequently, even if a majority of the members of Congress disagree with a judicial or administrative interpretation of a statute, it is very unlikely that they will be able to amend the statute quickly, if at all.

Id. at 98-99.

Professor Eskridge goes on to suggest that "the legislative inaction cases . . . have an asymmetrical, and unfair, impact on the development of legal rules." *Id.* at 114. Hence, "the presumption of correctness [for longstanding judicial or administrative interpretations] might overprotect interpretations benefitting well-organized interests, too often at the expense of the general welfare." *Id.* He concludes that "[g]iven the variety of reasons, unrelated to the merits or legislative support, for the failure of an idea or a measure in Congress, Justice Frankfurter was surely right when he opined in *Hallock* that such considerations 'indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.'" *Id.* at 99.

Today's crowded legislative agenda makes it hardly surprising that Congress has not been able to revisit the *Feres* doctrine. But legislative stalemate hardly absolves this Court of its obligation to interpret the FTCA according to its text and the intent of the enacting Congress.

III. Considerations of *Stare Decisis* Do Not Warrant Adherence to *Feres*.

Feres has been the law for over sixty years, and this Court does not lightly overturn its precedents. This Court has traditionally considered four factors in assessing the weight to be accorded a prior precedent as a matter of *stare decisis*:

> whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 832, 854-55 (1992) (plurality opinion) (citations omitted). Viewed in light of these factors, *Feres* is ripe for reconsideration.

The petition for certiorari in this case amply captures the widespread chaos that *Feres* continues to engender in the lower courts sixty years after it was decided. *See generally* Pet. Writ Cert., *Witt v. United States*, Jan. 7, 2011, at 6-22. Those courts have not been able to agree on the underpinning rationales for the doctrine, the criteria for its application, or how those criteria should be applied even in frequently-recurring fact situations. These uncertainties have real costs for real people in highly vulnerable circumstances. It is hard to think of a better example of an unworkable rule.

Conversely, it is hard to identify any meaningful reliance weighing in *Feres*'s favor, even if the notion of reliance espoused in *Casey* and similar cases extends to the Government and not just to private individuals and entities. *Feres* is no shield, after all, when civilians or off-duty servicemembers sue or (generally speaking) when servicemembers sue for nondamages relief. Moreover, the rule's highly uncertain construction in the lower courts means that the Government cannot count on *Feres* immunity even when the rule plausibly applies in principle. In any event, it would be unfair to impute to the Government any desire to violate its servicemembers' rights with impunity, or simply to loosen up its risk-management standards, simply because the Government might well avoid damages liability at the end of the day under *Feres*.

As for changed facts, today's military operates within a different security environment and force

structure than the military establishment of 1950. The advent of the All-Volunteer Force in 1973, radical shifts in methods of warfighting and corresponding requirements for training and readiness, reorientation of the armed forces from conventional wars to antiterrorism operations and low-intensity conflict, and deployment of high proportions of active duty forces and reservists all over the world – these changes are potentially relevant to the interests of military decisionmaking and discipline that *Feres* considered. Equally relevant are changes to the civil tort system that have increased the disparities between veterans' benefits and the potential payout of an FTCA tort suit.[8] At a time when the military is revising other longstanding assumptions about military discipline – such as the presumed incompatibility of equal rights for gay servicemembers with military discipline – this Court should reconsider the assumptions undergirding *Feres*.

Finally, important changes to the surrounding law have rendered *Feres* anachronistic. We identified the first and most crucial set of changes in Part II: the sea change in this Court's approach to private remedies that has returned attention to statutory text and reined in freewheeling judicial implication of both private remedies and defenses. Equally important, the range of claims to which *Feres* potentially

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[8] *See, e.g., Day*, 167 F.3d at 682 (observing that *Feres* was decided "[i]n an age of modest tort judgments")

applies has broadened considerably since 1950. For example, civil rights claims and whistleblower suits have a potentially critical role in maintaining the rule of law within military society that the *Feres* court could hardly have anticipated.

Given all these changes, as well as *Feres*'s rank unpredictability and the lack of meaningful military reliance on its rule, it is high time to revisit *Feres*'s judge-made rule of immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 10-885

In The Supreme Court of the United States

ALEXIS WITT, on Behalf of the Estate of DEAN WITT, deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE PEACE THROUGH LAW FOUNDATION, THE MILITARY LAW COMMITTEE OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, AND THE METROPOLITAN WASHINGTON D.C. TRIAL LAWYERS FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The Peace Through Law Foundation ("PTLF"), the Military Law Committee of the Bar Association of the District of Columbia ("MLC-BADC"), and the Metropolitan Washington D.C. Trial Lawyers Foundation ("TLA-DC") respectfully submit this brief as *amici curiae*. PTLF is a charitable organization dedicated to assisting American servicepersons and their families through the rule of law. It currently benefits over 800 military members and families who have been victims of international terrorism. MLC-BADC is comprised of lawyers who have served in the military and who practice in, or are interested in, military law. Most of MLC-BADC's members periodically represent military members or their families in litigation against the United States. In 2008, MLC-BADC sponsored a resolution, which the American Bar Association approved, to provide that only the exceptions specifically provided in the Federal Tort Claims Act would limit active-duty military members' access to the courts when they are victims of tortious

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[1] No counsel for any party to this action authored any part of this brief, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. *See* SUP. CT. R. 37.6. Counsel of record for both parties were notified of *amici*'s intent to file this *amicus* brief ten days prior to filing pursuant to Rule 37. The parties have supplied letters consenting to the filing of this brief. Those letters are submitted with this brief.

government conduct. TLA-DC is also an organization that engages in charitable giving. It is comprised of lawyers who frequently represent military personnel in claims against the United States. All of these organizations believe the *Feres* doctrine is an unjust deprivation of the right of service members injured by negligence to seek judicial relief, and feel it is their duty to advocate for the elimination or limitation of the doctrine. All three *amici curiae* thus have an interest in the Court granting the petition and resolving the legal issue in this case.

SUMMARY OF THE ARGUMENT

In 1946, Congress passed the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"), which waived the United States' liability for suits sounding in tort "under circumstances where the United States, if a private person, would be liable" to the claimant. The FTCA contained several exceptions. In 1950, the Court created the *Feres* doctrine, a new exception to the FTCA, which bars claims by military servicepersons if the claims are for injuries that arise out of or are in the course of activity incident to service, even if the claims are otherwise cognizable under the FTCA.

The *Feres* doctrine has created significant inequity. Among other things, the Courts of Appeals have construed the rule to bar all claims for malpractice by a serviceperson arising from the negligence of

personnel in military hospitals. The result is that the coincidence of being a military serviceperson can bar tort recovery in situations where a civilian would be entitled to seek proper compensation through the judicial process. This is such a case. The *Feres* doctrine also has an additional unfair impact on women and children associated with the military. Several courts have held that it bars claims by servicewomen for negligent prenatal care that harms their unborn children. Courts have also held the *Feres* doctrine bars claims arising from rape or sexual harassment perpetrated by one service member upon another. The rationales underlying the *Feres* doctrine do not justify these inequitable results.

The analytical foundation of the *Feres* doctrine is questionable. The legislative history suggests that Congress considered creating an exception similar to the *Feres* doctrine, but did not do so. Several of the bills that were precursors to the FTCA included exceptions similar to the *Feres* doctrine, but none of those became law. The Court tacitly admitted in *Feres v. United States*, 340 U.S. 135 (1950), and expressly admitted in *Brooks v. United States*, 337 U.S. 49 (1949), that the literal language of the FTCA did not allow for an exception covering claims by servicepersons, regardless whether the claim arose out of activities incident to service. Certain other provisions of the FTCA – those excluding from the FTCA claims for combatant activities and claims accruing while in foreign countries – show that Congress did not merely overlook the idea of claims by servicepersons. The *Feres*

doctrine is thus at odds with the language of the statute that Congress passed. Therefore, because the *Feres* doctrine yields severe inequitable results for servicepersons and their families, and because it appears to be contrary to Congress' intent, the Court should grant the petition and overrule *Feres v. United States* and its progeny.

ARGUMENT

In this case, a twenty-five-year-old American named Dean Witt ("SSgt. Witt") was killed by the gross negligence of a nurse providing post-operative care after an appendectomy. If SSgt. Witt had been a civilian, the hospital that employed the negligent nurse would likely have offered his family a settlement that properly compensated them for his death, or they would have been able to pursue their claims in court. SSgt. Witt, however, was a Staff Sergeant in the U.S. Air Force on extended leave, and the hospital was a military hospital. Based on these additional facts and the rule this Court formulated in *Feres v. United States*, 340 U.S. 135 (1950), the District Court and Court of Appeals concluded that SSgt. Witt's claim for medical malpractice was barred. Because SSgt. Witt chose to devote his life to protecting the people of the United States by serving in the military, his widow is denied a judicial remedy for the harms the United States caused through its grossly negligent hospital employee.

I. The *Feres* Doctrine Deprives Those Who Defend Our Country of the Basic Right to Seek Redress Through the Judicial Process.

The FTCA is a limited waiver of the United States' sovereign immunity from suit. Under it, one may sue the United States in

> civil actions on claims . . . for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable. . . .

28 U.S.C. § 1346(b)(1). In *Feres*, the Court adopted a non-textual rule of law that bars such claims by military servicepersons if the claim is for "injuries [that] arise out of or are in the course of activity incident to service," even if the claim is otherwise cognizable under the FTCA. *Feres*, 340 U.S. at 146. Because SSgt. Witt was a military serviceman and the hospital was on a military base, the courts below concluded that the gross negligence was "incident to service," and that the *Feres* doctrine barred any suit for damages by SSgt. Witt's estate.

The result in this case is unfair to Mrs. Witt and her child, both of whom survived SSgt. Witt. This case is not an anomaly; it is the norm. As the petition sets forth, cases in which courts apply the *Feres* doctrine and reach the same inequitable result

reached in this case are legion. (Pet. for a Writ of Cert. 6-22.) Systemic inequity such as this, especially when the rule the courts are applying finds no support in the FTCA's text or legislative history, begs for correction. That this wrong endures in a time of war, when we ask the members of our military to risk all for their country, is shameful.

A. In Situations Where a Private Citizen, or Even a Convicted Criminal, Could Seek Redress for Medical Malpractice, a Serviceperson Cannot.

One tragic result that appears repeatedly in the case law is that of medical malpractice at a military hospital. Indeed, it was the same wrong underlying two of the three cases consolidated in *Feres v. United States*, 340 U.S. at 137, and it is the wrong present in this case. *See also* 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 5A.08[3] (Matthew Bender & Co. 2010) (collecting cases). The *Feres* doctrine uniformly bars such claims by servicepersons. The result in these cases is even more unfair and nonsensical than in most others.

Malpractice by a government health care provider is a perfect analog for malpractice by a civilian health care provider, and thus presents "circumstances where the United States, if a private person, would be liable to the claimant." 28 U.S.C. § 1346(b)(1). The Court in *Feres* found the analogy flawed, however, because there existed no situation in which a private

person could conscript an army, and it would thus be creating a new source of liability to allow claims by a military serviceperson against the United States. *See Feres*, 340 U.S. at 141-42. That rationale seems to presume that one employed in a private military force, if such a person were to exist, would be barred from suing his or her employer in tort. Private persons, however, are generally able to sue one another unless some specific rule of law prohibits it. Moreover, "[u]nder [the Court's] reasoning, . . . many of the Act's exceptions are superfluous, since private individuals typically do not" engage in the categories of conduct expressly excluded from the FTCA. *United States v. Johnson*, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting). Regardless of the propriety of the rationale, however, the Court seemed to abandon it seven years later in *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) ("It may be . . . 'novel and unprecedented' to hold the United States accountable for the negligence of its fire-fighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."). *See Johnson*, 481 U.S. at 688-91 (omitting reference to the "parallel private liability" rationale); *id.* at 694-95 (Scalia, J., dissenting). All that remains, then, are the nontextual policy bases for the *Feres* doctrine, none of which are compelling enough to justify finding an exception to the plain language of the FTCA that deprives men and women of our armed forces of the

right to seek redress for tortious wrongs committed by military doctors and nurses.

Applying the *Feres* doctrine in the medical malpractice context causes arbitrary results. In this case, SSgt. Witt was a serviceman on extended leave being treated for appendicitis – an ailment unconnected with his military service – in a military hospital. His claims for malpractice were thus barred. If SSgt. Witt was stricken ill while he was off base, however, and taken to a civilian hospital's emergency room where he suffered the same gross negligence, his estate would be entitled to assert against that hospital the claims that his family asserts here. If SSgt. Witt's wife or child had suffered the same negligence at the hands of the same nurse in the same military hospital, they would be entitled to bring a tort claim against the United States. *See, e.g.*, *Mossow v. United States*, 987 F.2d 1365, 1368 (8th Cir. 1993) ("[C]laims are not barred under *Feres* when brought by civilians or civilian dependents of service members who have sustained a direct injury from military personnel."). Moreover, if it had been SSgt. Witt's wife or child who had been the victim, SSgt. Witt might be entitled to bring his own claim against the United States for secondary effects of the nurse's negligence, such as loss of consortium. *See, e.g.*, *Romero v. United States*, 954 F.2d 223, 225 (4th Cir. 1992) (allowing a husband and wife, both service members, whose child suffered cerebral palsy as a result of a military

doctor's negligence, to recover for their own resulting mental anguish and financial burden).[2]

The three broad rationales for the *Feres* doctrine do not justify these bizarre results. First, it may "make[ ] no sense" for claims between servicepersons and the United States, whose relationship is "distinctively federal in character," to be resolved by reference to the law of the state where the alleged harm occurred, *Feres*, 340 U.S. at 143-44, and it may be difficult for servicepersons, who are "at peculiar disadvantage in litigation," to maintain claims, *see id.* at 145. But, oddities in choice-of-law rules and difficulties for plaintiffs who *want* to pursue tort claims seem like poor justifications for barring such claims. *See Johnson*, 481 U.S. at 695-96 (Scalia, J., dissenting) ("[U]nfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that . . . nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery."). Next, although servicepersons are entitled to certain statutory benefits in the case of injury or death, *see, e.g.*, *Johnson*, 481 U.S. at 689-90 & n.10, such benefits are limited and do not provide full compensation for harms suffered. Service members, or their families, should be entitled to fair compensation for wrongful conduct by the United States' employees. And, it might be odd that Congress

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[2] The opinions by the various Courts of Appeals often reach inconsistent and varying results in these types of cases, as the petition discusses at length (Pet. for a Writ of Cert 11-18)

would not expressly provide for an offset for the statutory compensation that service members receive. *See id.* at 690. The Court, however, should not conclude that Congress intentionally omitted a set-off provision to justify finding that it accidentally omitted an exception for injuries incident to service.

The rationale that is generally considered the most compelling justification for the *Feres* doctrine is that suits by military servicepersons against other government employees might enmesh the judiciary in "sensitive military affairs at the expense of military discipline." *Id.* at 690. A suit by a soldier against a superior for a negligent order, for instance, might become a trend and wreak havoc on the military chain of command, disrupting the military's "specialized society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). This concern, however, does not justify adding additional, non-textual exceptions to the FTCA. Congress provided what it believed was necessary to avoid these military-discipline concerns by including exceptions in the FTCA's text. *See* 28 U.S.C. § 2680(a) (discretionary-function exception); 28 U.S.C. § 2680(j) (combatant-activities exception); 28 U.S.C. § 2680(k) (foreign-country exception); 28 U.S.C. § 2680(h) (intentional-torts exception).[3] Moreover, malpractice

[3] Cases raising serious chain-of-command concerns might warrant dismissal under the political-question doctrine, as such claims could "involve . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

claims against a military hospital will rarely, if ever, pose a risk to military discipline. In this case, for example, the nurse whose gross negligence harmed SSgt. Witt was not his superior, and SSgt. Witt would have needed an appendectomy even if he were not a serviceman. The only link between the suit and SSgt. Witt's military service is that, because he was in the Air Force, he went to a military hospital for treatment. He is not questioning the competence or control of his superiors or of the government. Such is usually, if not always, the case when the service member's claim is for medical malpractice.

The military-discipline rationale is even more untenable in cases like *Glenn Sr. v. Performance Anesthesia P.A.*, No. 5:09-CV-00309-BR, 2010 WL 3420538 (E.D.N.C. Aug. 27, 2010), in which the negligent medical professional is a civilian contractor who has been "deemed" a United States employee under the Medical Malpractice Immunity Act, 10 U.S.C. §§ 1089 & 1091 ("MMIA"). *See Glenn Sr.*, 2010 W.L. 3420538, at *5 ("[P]ursuant to the [MMIA], health care providers who serve under a personal services contract authorized by the U.S. Secretary of Defense are deemed to be employees of the government for the purpose of disposing of personal injury claims."). In such cases, the plaintiff is alleging negligence on the part of a civilian, and is asserting claims against the United States – rather than the individual – only because a federal statute requires it. Such claims are even less likely to raise

military-discipline concerns than claims against doctors who are members of the military.

The Court should not perpetuate a rule that has a net result of treating our military servicepersons as second-class citizens. Non-military citizens, including convicted criminals serving their prison sentences, may bring tort claims against the Government. *See Johnson*, 481 U.S. at 696 (Scalia, J., dissenting); *United States v. Muniz*, 374 U.S. 150, 150 (1963). Why should we afford our soldiers, sailors, airmen, and marines less right to redress wrongs than our felons possess? It is unfair that those who serve and risk their lives to protect us should have the judicial remedy taken from them because of that service. The Court should reconsider whether the policies supporting the *Feres* doctrine truly justify the inequity it creates.

B. The Doctrine Has an Additional Negative Impact on Women and Children, Above and Beyond that Occasioned on Men.

The *Feres* doctrine has an added unfair effect on women and children. In addition to claims that a male serviceperson might bring, many Courts of Appeals have held *Feres* to bar claims by women for negligence that harms their unborn children. In *Minns v. United States*, the Fourth Circuit barred suit by the wives of several soldiers who served in the first Gulf War, in which they alleged that the

government's intentional exposure of their husbands to toxic chemicals caused birth defects in their children. *See* 155 F.3d 445, 449-51 (4th Cir. 1998).

The inequity is even greater for servicewomen who become pregnant while on active duty. In *Irvin v. United States*, for example, the Sixth Circuit barred a claim for negligent prenatal care given to an active-duty servicewoman that resulted in the death of her newborn child. *See* 845 F.2d 126, 129-30 (6th Cir. 1988). Other Courts of Appeals have come to the same conclusion regarding negligent-prenatal-care claims. *See Del Rio v. United States*, 833 F.2d 282, 287-88 (11th Cir. 1987) (holding an active-duty Navy servicewoman barred from bringing claim for wrongful death of her son caused by negligent prenatal care at military hospital, but not barred from bringing claims as representative of her sons); *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987) (grudgingly holding an active-duty army servicewoman barred from bringing malpractice claim against military doctor related to prenatal care resulting in stillbirth of child). Many courts have also found that *Feres* bars recovery by the children who are harmed by negligent military doctors, leaving the family with no judicial recourse. *See Irvin*, 845 F.2d at 131 (holding claims by deceased child barred because "the claim ha[d] its 'genesis' in an injury to a serviceperson incident to military service."); *Scales v. United States*, 685 F.2d 970, 973 (5th Cir. 1982) (barring claim by child born with congenital rubella syndrome against the military hospital where his mother received

prenatal care); *Monaco v. United States*, 661 F.2d 129, 133-34 (9th Cir. 1981) (barring claim by serviceman's daughter for birth defects allegedly caused by serviceman's exposure to radiation during service). *But see Mossow*, 987 F.2d at 1368 ("[C]laims are not barred under *Feres* when brought by civilians or civilian dependents of service members who have sustained a direct injury from military personnel."). These results are unfair to the servicewomen and to the children, and might also provide a deterrent to military service.

The *Feres* doctrine has also been found to bar servicewomen's claims based on sexual harassment and sexual assault by other service members.[4] One of the most egregious examples is *Smith v. United States*, in which an Army private alleged that she was repeatedly raped by her drill sergeant over the course of several months. *See* 196 F.3d 774, 775-76 (7th Cir.

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[4] This problem is not felt solely by women, as some cases demonstrate, *see Ricks v. Nickels*, 295 F.3d 1124, 1127, 1133 (10th Cir. 2002) (barring a serviceman's claim based on sexual assaults by servicepersons acting as guards while plaintiff was imprisoned for a general court martial); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678, 680 (1st Cir. 1999) (barring a serviceman's claim based on sexual assault that occurred during a hazing incident by other servicepersons); *Dexheimer v. United States*, 608 F.2d 765, 767 (9th Cir. 1979) (barring a serviceman's claim based on sexual assault by other inmates while imprisoned for a general court martial), but it appears to impact women more frequently and more severely. Moreover, denying recovery for such claims is an intolerably unfair result regardless of the victim's gender.

1999). She sought to bring a negligent supervision claim against the United States based on those sexual assaults. *See id.* Even though each of the alleged rapes occurred off base and while both service members were off duty, the Seventh Circuit held that *Feres* barred the claim. *See id.* at 777-78. Shortly after *Smith*, the Central District of Illinois found that *Feres* barred similar claims by eight servicewomen against the U.S. Department of the Army. *See Bartley v. U.S. Dep't of Army*, 221 F. Supp. 2d 934, 948-49 (C.D. Ill. 2002). The plaintiffs in *Bartley* brought several claims, including negligent training and supervision, alleging "that they . . . suffered continuing harassment and retaliation, including rape, sodomy, unwelcome sexual advances and touching, requests for sexual favors, sexual innuendos, harassing phone calls, threats of physical harm, nonconsensual sex and duress." *Id.* at 936. Relying on the *Feres* doctrine, the district court dismissed all tort claims. *See id.* at 957. *See also Mackey v. United States*, 226 F.3d 773, 775 (6th Cir. 2000) (barring an Air Force captain from bringing claims of sexual harassment against her two immediate superior officers); *Mackey v. Milam*, 154 F.3d 648, 648 (6th Cir. 1998) (better describing the factual allegations in *Mackey v. United States*); *Stubbs v. United States*, 744 F.2d 58, 60-61 (8th Cir. 1984) (barring claims on behalf of the estate of a Army servicewoman who committed suicide as the alleged result of sexual harassment by her drill sergeant); *Shiver v. United States*, 34 F. Supp. 2d 321, 322 (D. Md. 1999) (barring claims by a servicewoman arising out of an alleged

rape by her drill sergeant while on duty). Sexual assault and harassment can have a devastating effect on the victim. These women should not be denied relief based on an exception that finds no place in the FTCA's text.

The relationship between women and the armed forces has changed dramatically in the past sixty years, providing yet another reason for the Court to reconsider its decision in *Feres*. The Court decided *Feres* two years after Congress passed the Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356 (1948). At that time, there were approximately 50,000 women in the armed forces, which "constituted little more than 1% of the total force." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 270 n.21 (1979). "By 1975, . . . the percentage had risen to 4.6%." *Id.* The number continues to grow. A recent estimate places the number of female servicepersons at 350,000 – seven times more than in 1950. *See* Women in Military Service for America Memorial, http://www.womensmemorial.org/Education/diduknow.html (last visited Feb. 5, 2011). Moreover, from 1951 to 1975, the armed forces could discharge women who became pregnant during their service, so issues related to pregnant servicewomen were essentially nonexistent. *See* Exec. Order 10,240, 16 Fed. Reg. 3,689 (Apr. 27, 1951); BETTIE J. MORDEN, WOMEN'S ARMY CORPS 1945-1978 at 377 (1990). The Court could not have anticipated the nature and severity of the unfair impact *Feres* would have on women over the next sixty years.

II. The FTCA Contains No "Feres" Exception, and the Court Should Take This Opportunity to Reverse *Feres*, or at Least Better Define the Doctrine's Limits.

Several times in the past year, members of the Court have expressed a strong conviction that the Court's duty with respect to legislation is to apply unambiguous statutory text as it is written. Although discussing a different statute, this Court stated last term: "It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago, Ill.*, 130 S. Ct. 2191, 2199-2200 (2010) (Scalia, J.). *See also Magwood v. Patterson*, 130 S. Ct. 2788, 2798 (2010) (Thomas, J.) ("We cannot replace the actual text with speculation as to Congress' intent. . . . Therefore, although we agree with the State['s argument,] that does not entitle us to rewrite the statute. . . ."); *Skilling v. United States*, 130 S. Ct. 2896, 2940 (2010) (Scalia, J., joined by Thomas and Kennedy, JJ., dissenting) (" . . . I do not believe we have the power, in order to uphold an enactment, to rewrite it."); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002) (Scalia, J.) ("Our task . . . is not to determine what would further Congress's goal . . . , but to determine what the words of the statute must fairly be understood to mean."). The Court should consider whether to continue supporting the *Feres* doctrine against this backdrop.

A. Both Houses of Congress Entertained Versions of the FTCA that Would Have Barred Servicepersons' Claims, but the Bill Ultimately Adopted Contained No Such Exception, Suggesting Congressional Intent to Permit Servicepersons' Claims.

In *Brooks v. United States*, the Court took note of legislative history that suggests that the Congress of 1946, which adopted the FTCA, had contemplated – and rejected – the idea of barring claims by servicepersons. The Court stated:

> More than the language and framework of the act support th[e] view [that the FTCA includes claims by servicepersons]. There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped. . . . When H.R. 181 was incorporated into the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared.

Brooks, 337 U.S. at 51-52. The Court found that legislative history persuasive in concluding that Congress considered, and rejected, the idea of barring claims by servicepersons. The Court also found persuasive that the statute, as enacted, included exceptions for combatant activities and activities in foreign countries, which would presumably cover a broad

swath of claims by military servicepersons for injuries incident to service. *See id.* at 51. In *Feres*, the Court seemed unimpressed by the legislative history that it discussed in *Brooks*. It mentioned that history in outlining the servicepersons' arguments, at which time it also acknowledged the existence of the combatant-activity and foreign-country exceptions found in the statute's text, but it did not directly address any of these points. *See Feres*, 340 U.S. at 138-39.

The United States may argue that, if Congress did not intend the *Feres* doctrine to be part of the FTCA, it could have passed a law overruling the decision. The Court in *Feres* used that fact to justify deviating from the statutory language when it stated: "[I]f we misinterpret the Act, at least Congress possesses a ready remedy." *Feres*, 340 U.S. at 138. To some extent, that is true; Congress has the power to legislatively overrule *Feres v. United States*. But referring to legislation as "a ready remedy" does not properly acknowledge the many difficulties involved in getting a statute drafted, passed by both houses of Congress, and signed by the President. More importantly, however, the argument proposes an unfair burden-shift. At least in the context of a comprehensive statutory scheme like the FTCA, Congress should not have to un-make a rule that it did not create. The Court should not find the lack of congressional action decisive, and should not wait for others to fix a problem it created.

Some of the tort claims bills introduced in Congress prior to the enactment of the FTCA establish

that Congress considered a rule much like the *Feres* doctrine, but did not enact it. Several bills would have barred "claims of persons in the military forces for injury received in the line of duty or for which relief is provided by other law." Jayson & Longstreth, *supra*, § 2.09[8] & n.13 (citing H.R. 12179, 68th Cong., 2d Sess. (1925); H.R. 8914, 69th Cong., 1st Sess. (1926); S. 211, 72d Cong., 1st Sess. (1931); H.R. 5065, 72d Cong., 1st Sess. (1931)). Other bills would have barred "claims arising out of negligence of any employee of a government hospital, . . . or of any physician, surgeon, nurse, or orderly in connection with the rendition of medical or surgical treatment." Jayson & Longstreth, *supra*, § 2.09[8] & n.16 (citing S. 211, 72d Cong., 1st Sess. (1931); H.R. 5065, 72d Cong., 1st Sess. (1931)). Yet another bill would have barred "claims of persons receiving compensation under the provisions of any of the acts providing compensation to federal employees for the same injury." Jayson & Longstreth, *supra*, § 2.09[8] & n.12 (citing H.R. 8914, 69th Cong., 1st Sess. (1926)). Congress adopted none of these bills, and the FTCA that was enacted contained none of these exclusions. That Congress contemplated a *Feres*-like rule and did not adopt it casts doubt on the notion that the *Feres* doctrine is consistent with legislative intent. *See, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 n.7 (2001) ("Although as a general rule we are hesitant to construe statutes in light of legislative inaction . . . , we note that Congress has twice considered specific proposals to protect Indian trust information[.] We do so because these proposals confirm

the commonsense reading that we give Exemption 5[.]") (citation omitted).

B. The *Feres* Court Tacitly Acknowledged that the Plain Language of the FTCA Did Not Exclude Claims of Servicepersons, Incident to Service or Otherwise.

The plain language of the FTCA does not exclude claims by servicepersons, even for claims arising from activities incident to service. The Court in *Feres* tacitly admitted that it did not. *See Feres*, 340 U.S. at 140-41 ("[The FTCA] confers jurisdiction to render judgment upon all such claims. * * * But it does not say that all claims must be allowed."). One year earlier, in *Brooks v. United States*, the Court said so expressly: "The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. None exclude petitioners' claims." *Brooks*, 337 U.S. at 51. The *Brooks* Court, in *dicta*, admitted that a *Feres*-type rule would be a deviation from the plain language of the FTCA: "The Government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, *despite literal language and other considerations to the contrary*." *Brooks*, 337 U.S. at 53 (emphasis added). In other words, this Court acknowledged, before it created the *Feres* doctrine, that the doctrine would be inconsistent with

the FTCA's "literal language." *Id.* The *Feres* doctrine is a result of the Court "rewrite[ing] the statute so that it covers only what [the Court thought was] necessary to achieve what [the Court thought] Congress really intended." *Lewis*, 130 S. Ct. at 2199-2200. The Court should restore the statute to reflect the text that Congress wrote.

C. *Stare Decisis* Should Not Be Invoked to Perpetuate a Rule of Law that Sows Inequity, and Which Is Contrary to the FTCA's Plain Language and Apparent Legislative Intent.

Adoption of the *Feres* doctrine was contrary to Congress' intent in drafting the FTCA and the unfair results of its application outweigh any benefit derived from retaining the doctrine. The Court should therefore take this opportunity to consider whether *Feres* and its progeny should be overruled. As the petition notes, "*stare decisis* 'is a principle of policy and not a mechanical formula of adherence,' *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), adherence to precedent must yield to reasoned reconsideration when 'the analytical underpinnings [of a holding are] substantially weakened,' *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997)[.]" (Pet. for a Writ of Cert 6.) *See also Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009) ("Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the

decision was well reasoned."). As explained above, as set forth in the dissenting opinion in *Johnson*, 481 U.S. at 692-703, and as set forth in the petition, there are good reasons to question the workability and analytical underpinnings of the *Feres* doctrine. *See also* Nicole Melvani, *The Fourteenth Exception: How the* Feres *Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395 (2010); Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 1 (2007); Jonathan Turley, *Pax Militaris: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 6-27 (2003). The Court should grant the petition and re-analyze the doctrine with the benefit of full briefing and argument.

CONCLUSION

Every day, in airports all across the country, ordinary citizens spontaneously stand up and applaud as our soldiers, sailors, airmen and marines return from war. It is a small but heartfelt gesture by a grateful people. Now we ask this Court to stand up for the legal rights of those who go in harm's way on our behalf.

For the reasons set forth in this brief, and those set forth in the petition, the *amici curiae* ask the

Court to **GRANT** the petition and overrule *Feres v. United States*.

Respectfully submitted,

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In The Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF POINT MAN INTERNATIONAL MINISTRIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Point Man International Ministries ("PMIM") is a faith based organization started in 1984 and run by veterans from all conflicts, nationalities and backgrounds. Although PMIM's primary purpose has always been to offer spiritual healing of Post Traumatic Stress Disorder ("PTSD"), PMIM today is involved in group meetings, publishing, hospital visits, conferences, supplying speakers for churches and veterans groups, welcome home projects and community support. PMIM began in Seattle, Washington, and has now developed into a system of small groups across the United States. All services offered by PMIM to veterans are free of charge.

SUMMARY OF ARGUMENT

Review should be granted and *Feres* should be overruled in its entirety. This brief argues three points in support of that proposition: (1) *Feres* was wrongly decided because the plain language of the

[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for the parties authored this brief in whole or in part, and no person or entity other than amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, Counsel of Record for the parties were notified at least 10 days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief, and their letters of consent are included with this filing.

FTCA controls, (2) the doctrine of *stare decisis* is outweighed by the inconsistent results engendered by *Feres*, and the absence of any legitimate reliance interest in its application, and (3) after ten years of continuous combat deployments, the longest in our country's history, our Armed Services need our Nation's support more than ever, including in the new access to justice that overruling *Feres* would bring.

ARGUMENT

I. *FERES* WAS WRONGLY DECIDED – THE FTCA'S PLAIN LANGUAGE CONTROLS

As the court of appeals in this case correctly observed, in "*Feres v. United States*, the Supreme Court established an exception to the FTCA's waiver of sovereign immunity 'for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.'" Memorandum Opinion, at 2 (reprinted at Petitioners App. 1a).

In a subsequent case considering that judicially established exception, *Johnson v. United States*, 481 U.S. 681 (1987), the rule announced in *Feres* was characterized, accurately it is submitted, as an "unauthorized rationalization gone wrong." 481 U.S. at 702 (Scalia, J. dissenting).

The *Feres* Court simply had no warrant – and as explained below, no reason – to create such an exception. The wording of the Federal Tort Claims Act

("FTCA"), 28 U.S.C. §§ 1346, 2671-2680, is unambiguous and clearly contradicts such an exception.

This was made plain in the *Johnson* dissent, 481 U.S. at 692-694 (*e.g.*, at 693: "Read as it is written, this language renders the United States liable to *all* persons [emphasis original], including servicemen, injured by the negligence of Government employees"), and perhaps even more remarkably, acknowledged in *Feres* itself. 340 U.S. at 138 ("We do not overlook considerations persuasive of liability in these cases") (reciting and discussing language of FTCA indicating servicemen may recover).

A first principle of statutory construction is that courts must not read into unambiguous legislation words that are not written. *E.g., Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'") (citation omitted).

As Justice Scalia's dissenting opinion in *Johnson* forcefully and eloquently explains, the fundamental, core problem with the *Feres* doctrine is the Court did exactly that. *Johnson*, 481 U.S. at 692, 703 ("The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it . . . because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been

prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things), be just. But it has not been, and it is not. I respectfully dissent").

As the dissent also pointed out, the Court "realized seven years too late that '[t]here is no justification for this Court to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered that is a function for the same body that adopted it." *Johnson*, 481 U.S. at 702 (Scalia, J. dissenting), quoting *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957) (footnote omitted – first brackets by the Court).

Even more regrettable, as one commentator has recently observed, when the Court "promulgated the *Feres* doctrine it had several tools at hand, in the form of the Federal Tort Claims Act's enumerated exceptions," to prevent the now generally perceived greatest danger in allowing tort recovery, "intruding upon military decision making and discipline." Major Deirdre G. Brou, "Alternatives to the Judicially Promulgated *Feres* Doctrine," 192 MIL. L. REV. 1, 60 (Summer 2007); *cf., Johnson, supra*, 481 U.S. at 694 (Scalia, J. dissenting) ("Several years after *Feres* we thought of a fourth rationale: Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline"), citing *United States v. Brown*, 348 U.S. 110, 112 (1954).

As Major Brou persuasively argues, there *is* no such danger to military discipline contained in the FTCA, if the text of the statute is only read correctly, as it is actually written.

Specifically, through "its cases interpreting the Federal Tort Claims Act's discretionary function exception, the Supreme Court has established a two-part test" to determine whether the exception "shield's the United States from suit for its employees' negligence." 192 MIL. L. REV. at 65.

"Courts can apply this two-part discretionary function test to protect the military's decision making process and its discipline." *Id.* at 66.

This thesis comports naturally both with Congress' overall purpose in the FTCA, and with this Court's interpretation of its exceptions.

These exceptions, including the discretionary function exception, "mark 'the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" *Molzof v. United States,* 502 U.S. 301, 311 (1992) (citation omitted). In them, "'Congress has taken steps to protect the Government from liability that would seriously handicap efficient government operations.'" *Id.* (citations omitted).

Indeed, illustrating the efficacy of Major Brou's thesis requires the addition of only one word to this Court's latest, essential statement of the discretionary

function's purpose: "the purpose of the exception is to 'prevent judicial second guessing of legislative and administrative decisions grounded in [*military*], social, economic, and political policy through the medium of an action in tort'". *United States v. Gaubert,* 499 U.S. 315, 323 (1991) (citation omitted – brackets and emphasis added).

As Major Brou explains, under the concept of "mission command, commanders provide subordinates with a mission, their commander's intent and concept of operations, and resources adequate to accomplish the mission. Higher commanders empower subordinates to make decisions within the commander's intent. They leave details of execution to their subordinates and require them to use initiative and judgment to accomplish the mission." Brou, *supra,* 192 MIL. L. REV. at 67 (citation omitted).

"This delegation of leadership authority concept permeates all areas of the military, not just combat operations. Military commanders at all levels possess great authority and discretion to train units, mete out military justice, and manage people." *Id.* (citations omitted).

"If applied to the military context, the Federal Tort Claims Act's enumerated exceptions, particularly the discretionary function exception, can protect this leadership concept from judicial second-guessing while also preserving service member's rights under the Act." Id. (emphasis added).

This one simple, but brilliant insight, and the many other reasons cited by Petitioner in this case, and many others before her, compel the conclusion that *Feres* was incorrectly decided.

This leaves only, it is submitted, the one question left unanswered in Justice Scalia's ringing dissent: "whether considerations of *stare decisis* should induce us, despite the plain error of the case, to leave bad enough alone." *Johnson, supra,* 481 U.S. at 703 (Scalia, J. dissenting).

II. THE DOCTRINE OF *STARE DECISIS* IS CLEARLY OUTWEIGHED

As phrased, Justice Scalia's question nearly answers itself, in the negative. The factors in deciding whether to adhere to the principle of *stare decisis* include "of course whether the decision was well reasoned." *Montejo v. Louisiana,* ___ U.S. ___, 129 S.Ct. 2079, 2089 (2009) (citation omitted). The dissenting opinion in *Johnson*, joined by three other members of this Court, shows thoroughly and compellingly that *Feres* was not well reasoned.

Furthermore, "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Id.* at 2088 (citation omitted).

And the Petitioner in this case has exhaustively shown why as a precedent *Feres* has proven unworkable. *See, Petition for Cert.,* filed January 7, 2011 at pp. 6-18 (detailing disparate tests developed and

multiple inconsistent, inequitable results reached by lower federal courts).

Another standard factor in determining the weight of *stare decisis* considerations are "the reliance interests at stake". *Montejo, supra,* 129 S.Ct. at 2089. Surely all can agree there is no legitimate reliance interest entailed in committing negligence that harms others. In other words, the government cannot credibly contend that it has legitimately relied upon *Feres* as establishing a right to commit torts with impunity. This factor too therefore weighs heavily against *stare decisis* and in favor of overruling *Feres.*

Moreover, an obvious corollary is that overruling *Feres* will give the government an incentive (and as discussed in the next section, a very timely one) *not* to commit negligence that harms members of our Armed Services.

A final *stare decisis* factor is "the antiquity of the precedent". *Montejo, supra,* 129 S.Ct. at 2089. And *Feres* was decided sixty-one years ago.

But to this, *amicus* would respond with what this Court has often said: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.,* 335 U.S. 595, 600 (1949) (Frankfurter, J. dissenting) (later citations omitted).

III. THE ARMED SERVICES NEED OUR NATION'S SUPPORT NOW MORE THAN EVER

"For the second year in a row, the U.S. military has lost more troops to suicide than it has to combat in Iraq and Afghanistan" and the suicide rate is "an indication of the stress that military personnel live under after nearly a decade of war." John Donnelly, "More troops lost to suicide" (January 24, 2011), published online at http://www.congress.org/news/2011/01/24/more_troops_lost_to_suicide.

To illustrate this ongoing crisis, Congressman Rush D. Holt of New Jersey recounted the tragic story of one of his constituents, Coleman S. Bean, who "was an Army sergeant and Iraq War veteran who suffered from post-traumatic stress disorder but could not find treatment. He took his own life in 2008." Donnelly, *supra*.

Amicus PMIM is doing everything it can to support our service members, particularly in coping with the greater than ever incidence of PTSD among returning veterans. PMIM respectfully asks that this Court do its part too, by overruling and correcting the longstanding inequity of *Feres*.

This will provide greater access to justice for military personnel and their dependent families, thereby improving their morale, in the face of the many difficult challenges that undoubtedly still lie ahead.

"After all" the morale of a deceased serviceman's "comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of what they might have recovered" but for the *Feres* doctrine. *Johnson, supra,* 481 U.S. at 700 (Scalia, J. dissenting).

CONCLUSION

Review should be granted in this case, and *Feres* should be overruled in its entirety, allowing appropriate recovery to the family of SSgt. Dean Witt.

Respectfully submitted,

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February 9, 2011

No. 10-885

Supreme Court, U.S.
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In The

Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* VETERANS' EQUAL RIGHTS PROTECTION ADVOCACY IN SUPPORT OF PETITION FOR CERTIORARI

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I. Interest of *Amicus Curiae* VERPA in This Lawsuit[1]

On December 4, 1950 this Court handed down its decision in *Feres v. United States*, 340 U.S. 135 (1950), in which it denied relief under the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.* ("FTCA"), to the family of a serviceman who had died as the result of a fire in a military barracks. On the same date, the Court decided two companion cases involving claims of medical malpractice committed against soldiers who were on active duty, and held that the suits could not be maintained because of sovereign immunity (*Jefferson v. United States* and *United States v. Griggs* [*ibid.*]). The common thread running through the three decisions was that in each instance, the injuries alleged "arise out of or are in the course of activity incident to service" in the armed forces. This non-textual, judicially created exception to the waiver of immunity in the FTCA has come to be called "the *Feres* doctrine."

Amicus curiae Veterans' Equal Rights Protection Advocacy, Inc. ("VERPA") was formed on December 10, 1999 under Minnesota law, with a primary goal to

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

remedy the injustices to servicemen that have accumulated under the *Feres* doctrine since it was first announced in 1950. VERPA's membership is made up exclusively of servicemen and their families who have been barred by the holding in *Feres* from seeking redress in the federal courts for injuries received in the course of military service. Its board is very active in sponsoring and moving cases through the courts whose circumstances are such as to prompt a reconsideration of the misguided rationales said to justify the doctrine. VERPA attempts to ensure that military members, discharged Veterans and their families are provided "equal justice under law" and that they may freely exercise their right to petition the government for redress of grievances under the First Amendment of the United States Constitution, given their unfair and unequal treatment to date by the courts and Congress.

II. Introduction and Summary of Argument

A man comes down with appendicitis. An ambulance transfers him to the closest hospital, which is maintained by a branch of the United States government. After his swollen appendix is successfully removed, he is lying on a gurney, still under the effects of anesthesia, and waiting to be moved into a post-operative care room.

A surgical nurse removes his airway. It is too soon – under the anesthesia, his throat muscles collapse, and he begins gasping for breath. Inexplicably, the

nurse has walked away, and no one notices the patient's distress until it is too late. They wheel him into a nearby pediatric unit, but the equipment with which they try to revive him is too small for the job. An emergency intubation miscarries, and sends the essential oxygen he needs into his esophagus, rather than into his lungs. After lapsing into a coma for a day, the patient dies.

The family of the decedent sues the United States Government for wrongful death under the Federal Tort Claims Act. What result?

(A) If the man is the spouse of a member of the armed forces on active duty, his widow's suit is not barred under the Federal Tort Claims Act (*Costley v. United States*, 181 F.2d 723 [5th Cir. 1950]).

(B) If the man is a veteran, retired from active duty, his suit is not barred under the Federal Tort Claims Act (*United States v. Brown*, 348 U.S. 110 [1954]).

(C) If the man is a civilian in federal custody, his suit is not barred under the Federal Tort Claims Act (*United States v. Muniz*, 374 U.S. 150 [1963]).

(D) But if the man is a member of the armed forces, whether or not he is on leave or active duty at the time of the malpractice, his family's suit is barred because his death "ar[o]se out of or [was] in the course of activity incident to service" (*Feres v. United States*, 340 U.S. 135 [1950]; *United States v. Johnson*, 481 U.S. 681, 692 [1987]).

The case of suffering medical malpractice while on leave from active duty is the subject of the current petition for certiorari: *Witt v. United States*, 379 Fed.Appx. 559 (9th Cir. 2010); *see also Persons v. United States*, 925 F.2d 292, 296 (9th Cir. 1991); *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980).

The foregoing illustrations point up the irrationality of the *Feres* doctrine. Under it, prisoners in federal custody are afforded greater remedies for malpractice by government hospitals and their staff than are the members of the armed forces of the United States. Of especial interest to *amicus* VERPA, the doctrine discriminates in favor of veterans against soldiers currently serving their country.

Under the case law that has developed since *Feres*, the discrimination no longer makes sense. Exactly the same medical staff, and the same military hospital, may be sued in federal courts if the victim is a military dependent, or a veteran – even though in each of their cases, the medical services in question may also be said to have arisen "out of . . . activity incident to [a member's] service." (The treatment in a military hospital would not have occurred but for the prior or concurrent service by a member of the armed forces.) Therefore, whatever basis may still be said to underlie the *Feres* doctrine, it cannot be that any such suit against military medical staff and hospitals "would be disruptive of discipline and the orderly conduct of military affairs." (*Henninger v. United*

States, 473 F.2d 814, 816 [9th Cir.], *cert. denied*, 414 U.S. 819 [1973]).

Such a rationale, however, is the only one to which the lower federal courts still pay lip service. This Court itself has systematically undermined or abandoned each of the other rationales it previously offered to support the *Feres* doctrine, and the remaining rationale holds up no better under analysis. (*See United States v. Johnson*, *supra*, 481 U.S. at 694-700 [Scalia, J., dissenting]; *Costo v. United States*, 248 F.3d 863, 874-76 [9th Cir. 2001] [Ferguson, J., dissenting], *cert. denied*, 534 U.S. 1078 [2002].) Under these circumstances, further adherence to the *Feres* doctrine on *stare decisis* grounds is indefensible, and its application in particular to cases of medical malpractice is, given the statutory immunity of military doctors, discriminatory and irrational.

III. Reasons for Granting the Writ

A. After Sixty Years, *Feres* No Longer Serves any Rational Purpose

If any vestiges of reasons for the *Feres* rule survive after sixty years, it cannot be because of the rule itself. The phrase "activity incident to service", having been pulled and stretched and applied to all kinds of fact situations, is now empty of content. (One court describes the phrase as having given way to an "'incidental to service' inquiry . . . ". *See Costo v. United States*, *supra*, 248 F.3d at 870 n. 1.) Six

decades of confusing and conflicting case law attest to its ambiguities.

The phrase is so open-ended that it has been held to comprise driving home from the grocery store in a civilian vehicle on a public highway which crosses Eglin Air Force Base in Florida while off-duty, so as to deny recovery (*Flowers v. United States*, 764 F.2d 759 [11th Cir. 1985]), but it does not include riding a motorcycle back from a personal errand on a public highway which crosses Fort Stewart in Georgia while off-duty (*Pierce v. United States*, 813 F.2d 349 [11th Cir. 1987]; *see also Hand v. United States*, 260 F.Supp. 866 [M.D.Ga. 1966]).

And even though this Court has warned against the drawing of bright lines (*United States v. Shearer*, 473 U.S. 52, at 57 [1985]), and to judge each case on its own facts, such distinctions have nonetheless emerged out of the absence of any discernible guideposts for the doctrine's application. Lower courts, for example, frequently find the factor of whether the injury was sustained while "on-base" to be dispositive. In this way, the *Feres* doctrine was held to bar recovery to the estate of an off-duty serviceman killed while sleeping in a base's family quarters when a military aircraft crashed into the building (*Orken v. United States*, 239 F.2d 850 [6th Cir. 1956]). It did not bar recovery, however, for a similar accident causing severe injury to an off-duty serviceman sleeping in a trailer home located just off-base. (*Sapp v. United States*, 153 F.Supp. 496 [W.D.La. 1957]; *see also*

Snyder v. United States, 350 U.S. 906 [1955], *aff'g* 118 F.Supp. 585).

These results, typical of the quagmire brought about in the name of *Feres*, cannot be rationalized by any purported divination of Congressional intent behind the FTCA. The key language "incident to service" was lifted by the *Feres* court out of the old Military Personnel Claims Act, former 31 U.S.C. § 223(b) (1943), which Congress *repealed* in passing the FTCA.[2] Normally this Court would take the language replaced by a subsequent enactment of Congress as an indication of that which Congress intended to *change* – otherwise the repeal is given no effect. *See, e.g., Thompson v. Thompson*, 218 U.S. 611, 616-17 (1910). The rule of *Feres* thus rests on a statutory

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[2] Former 31 U.S.C. § 223(b) (1943; repealed 1946) provided:

> The Secretary of War, and, . other officer or officers as he may designate . . . are hereby authorized to consider, ascertain, adjust, determine, settle and pay in an amount not in excess of $500, or in time of war not in excess of $1,000, . . . any claim against the United States . . for damage to or loss or destruction of property, real or personal, or for personal injury or death,
>
> provided, the provisions of this Act shall not be applicable to claims arising in foreign countries . or the claims for damage to or loss or destruction of property of military personnel . if such damage, loss, destruction, injury, or death, occurs incident to their service.

The new Administrative Claims Act, 28 U.S.C. § 2672, authorizes settlement of military and other claims up to $25,000 *without regard to* whether they arise "incident to service."

construction erected in spite of the FTCA, and not because of it. For that reason alone, the rule of *Feres* is an incorrect construction of the FTCA and deserves to be overruled.

Taking into account the totality of circumstances, *amicus curiae* submits that the maxim that should apply to this case is *cessante ratione legis, cessat et ipsa lex*. The judicial creation of a legal fiction is intended to carry out a policy purpose; that policy purpose is supposed to derive from an ascertainable intent of the legislature. No one can point to the intent of Congress in enacting the FTCA and divine that malpractice claims of spouses and dependents were included within the scope of the Act, while identical malpractice claims of soldiers were not. When the line that has previously been attempted in a case of this type ("injuries received in military hospitals while serving in the military are received incident to service") begins to produce results obviously arbitrary and irreconcilable with legislative intent, it is an indication that blind adherence to a legal fiction, or *stare decisis*, has replaced the original reason for the rule. And if that were sufficient reason for retaining it, then no case would ever be overruled.

Nor can this Court hand off the task of repairing the damage done by the *Feres* doctrine to Congress. As shown above, the phrase "activity incident to service" is now so vague as to be empty of content. Congress could do no better than the lower courts have done, over the past sixty years, in trying to give it meaningful substance. Moreover, having deliberately

chosen to repeal that language in enacting the FTCA, it is not Congress' task to repeal it yet again.

Feres, as restated and affirmed in *Johnson*, has lasted long enough. No conceivable rationale exists for its continuing to wreak random and arbitrary havoc among the families of those who are in the service of their country. *Amicus curiae* VERPA respectfully requests the Court to grant the petition in this case, and to call on the parties to brief for it fully the issues involved in any overruling of *Feres* and *Johnson*.

B. The *Feres* Doctrine Should Be Inapplicable to All Cases of Medical Malpractice

If *Feres* and *Johnson* are not to be overruled, this case should at a minimum serve as the vehicle by which to mark their limit. While it is true that two of the companion cases decided along with *Feres* involved military medical malpractice, the time has come to re-examine the basis for declaring that injuries to servicemen in military hospitals are received "incident to service".

Concerns about military doctors being brought into court to testify in malpractice cases are ephemeral, given that they must do so already in cases brought by dependents and veterans. Indeed, the reality is that with the nonliability afforded the government by *Feres*, the only incentive to improve standards of military medical care has come from the

litigation allowed to military dependents and to veterans. As a result, the armed forces now have a claims process for malpractice in place, which operates efficiently enough; reported court decisions involving military dependents' claims of malpractice are few and far between.[3] In fact, given the relative frequency with which the lines of *Feres* are tested in malpractice suits brought by servicemen and their representatives, compared to the relative paucity of reported malpractice suits brought by dependents and veterans, there is obviously a basis on which to assert that the administrative claims process presently in existence will *lessen* the current burden on the courts in the great majority of such cases, where questions of military decisions and discipline are not involved.

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[3] A 1971 case reasoned that if the legal fiction regarding the presumed effect of malpractice suits upon discipline were abandoned, the armed services would be faced with maintaining a claims department, a decision that should be left to Congress. *Hall v. United States*, 451 F.2d 353, 354 (1st Cir. 1971). The court unaccountably overlooked the fact that an efficient military claims department had already been processing dependents' malpractice claims since before *Feres*. The same department, of course, must pass on all claims of servicemen and their representatives before they are brought to the courts (28 U.S.C. § 2401[b]). Thus the number of claims to be processed would increase only by the number of servicemen presently deterred from litigating even liability under the existing bright-line rules; the remainder consist of existing claims that will have to be examined for damages in addition to liability. Surely that would not be too unequal a trade-off for the current burden on the Department of Justice in litigating over "incident to service".

The *Feres* decision was handed down in 1950. Since that time, military doctors and their staff have been granted statutory immunity from personal liability for malpractice (Pub. L. 94-464, § 1[a], effective Oct. 8, 1976 [10 U.S.C. § 1089]), and courts have uniformly affirmed that military *dependents* may sue the government for injuries due to malpractice in military hospitals. Given these changes, it can no longer be contended that medical malpractice suits by servicemen have the potential for an adverse impact upon essential military discipline.

A number of cases have reasoned that because military personnel receive free medical care in military hospitals only because of their military status, the injuries received due to malpractice were "incident to service." *See, e.g., Johnson v. United States*, 704 F.2d 1431, 1438-39 (9th Cir. 1983), and cases cited. The reasoning has not escaped criticism, *e.g., Adams v. United States*, 728 F.2d 736, 740 (5th Cir. 1984). With all due respect, it is submitted that this reasoning cannot stand up to logical examination, and should be discarded.

The illogic appears when one considers the cases just cited that permit recovery to military dependents injured by malpractice, on the theory that such injuries do *not* occur "incident to service." (This is a perfect illustration of the empty content of the phrase "incident to service," as noted *supra*, at 6-7.) Military dependents, like military personnel themselves, are usually accorded treatment in military hospitals only because of their status. *Compare* 10 U.S.C. § 1076

(2001) *with Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980). Like military personnel, they too could not be injured "but for" the fact that they are privileged to receive free medical care in military hospitals. Yet this fact bars neither their recovery *nor* recovery by the serviceman whose relation to them gives them the right to free medical benefits. Therefore, the receipt of free medical benefits, standing alone, is not determinative of whether injuries received from such care are received "incident to service." *See also Adams*, 728 F.2d at 738-41.

The same result can be reached by analogy to *United States v. Muniz*, 374 U.S. 150 (1963). In that case, using a "plain meaning" interpretation of the FTCA, the Court permitted a prisoner in government custody to sue the government for injuries received during confinement. The Court in *Muniz* had granted certiorari because of conflicting lower court decisions regarding prisoners which had relied on *Feres*. Proceeding with precisely the same inquiry into Congressional intent that it conducted in *Feres*, the Court now concluded that Congress had authorized the prisoner's claim. The anomaly here is that, in contrast to *Feres*, the Court rejected an argument that such suits could disrupt discipline. Moreover, like military personnel, federal prisoners receive free medical care. Nevertheless the Court made no effort to distinguish *Feres*. Thus was born the egregious state of FTCA law pursuant to which criminals in confinement are accorded greater rights than free military personnel in the service of their country.

Such inconsistency is another tell-tale sign that a legal fiction has outlived its purpose, as argued earlier.

Cases involving malpractice committed upon pregnant women are another instance of the lack of any meaningful distinction between the treatment afforded to those in the armed services and their spouses and dependents. A soldier's pregnant spouse may recover under the FTCA for medical malpractice, despite *Feres* (*Costley*, *supra*), while a pregnant woman *soldier* injured by malpractice is barred (*Atkinson v. United States*, 825 F.2d 202 [9th Cir. 1987], *cert. denied*, 485 U.S. 987 [1988]).

The two women could have received the same negligent treatment in all respects. The same witnesses would be called, the same factual inquiries made, the same claims of negligent conduct leveled against a military physician by a fellow member of the military (the woman's husband would be claiming that the negligence resulted in loss of consortium and loss of his wife's services). Neither the suit by the civilian wife nor her military husband would be barred. Yet the civilian spouse and the soldier spouse are indistinguishable in that they are both entitled to free medical care for their pregnancy in the military's hospital.

It makes no sense to try to distinguish the cases on the basis of the victims' status; the negligence toward each of them was exactly the same in character and degree. But in *both* cases the only reason it is

possible to be negligent toward the victims at all is because of the *soldier's* military status. Given this unalterable fact, it exalts semantics over substance to claim that "decisions by the military toward enlisted personnel" are involved in the negligence toward a soldier, but not in the negligence toward a soldier's wife.[4] Would a military doctor view the standard of care and treatment as any different for the two patients, both of them pregnant women? Does not the injuring of a soldier's dependent wife, husband, or child have just as much an effect on military morale and discipline, and on the soldier's attitude toward his or her superiors, as does an injury to the soldier?

The metaphysical content of "incident to service" causes the greatest difficulty in cases of malpractice injuries to unborn children. The lower courts vary all over the map in such cases, from holding that such injuries are "incident to [the mother's] service" (*Scales v. United States*, *supra*, 685 F.2d at 973), to holding that they clearly are not (*Mossow v. United States*, 987 F.2d 1365, 1370 [8th Cir. 1993]), to holding that such a suit is not barred if the actual injury was to the fetus, and not derivative from injuries to the mother (*Brown v. United States*, 462 F.3d 609, 612-16 [6th Cir. 2006]).

There *is* an anomaly here – one that simply cannot be reasoned away. It is an anomaly that is due

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[4] *Cf. Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

to the continued application of a legal fiction that has outlived its usefulness in dealing with the situations encountered in today's armed forces. The fiction that medical malpractice injuries are received "incident to service" was invented by later courts to explain the *Feres* rule as applied in *Griggs* and in *Jefferson*, its two companion cases. Now that the core concern of *Feres* is recognized as the potential which a given case may have on judicial involvement in purely military affairs, and given the intervening legislative changes made by Congress, the need for maintaining such a fiction in medical malpractice cases has vanished.

Amicus curiae VERPA urges the court to grant the petition in *Witt*, and to limit the *Feres* doctrine to cases other than those involving medical malpractice in military hospitals.[5]

IV. Conclusion

Over one hundred and ten years ago, this Court read a judicially created exception into another text which had been carefully deliberated in Congress – the Fourteenth Amendment. The *Feres* exception has now outlasted the one in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), and thereby gained an unenviable

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[5] Existing statutory exceptions to 28 U.S.C. § 2680 already preclude suits for injuries received while in military field hospitals, which are erected to serve combatants, or in facilities outside the United States (subsections [j], [k]).

record. Its ultimate fate should be no less discernible, following the accumulation of more than sixty years of confusion and deprecation in the lower courts. The present case provides the Court with an occasion to rectify, or at least to begin the process of mitigating, the arbitrarily harsh results of its *Feres* rule. *Amicus curiae* Veterans' Equal Rights Protection Association respectfully requests the Court to grant certiorari in the present case for the purpose of either limiting or overruling *Feres* and *Johnson*.

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